No. 217

No. 12,953

SUPREME COURT, U.S.
FILED
JUN 22 1957
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals for the Sixth Circuit

MORRIS W. ZACK and SARAH ZACK,
Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee

ON REVIEW FROM THE TAX COURT OF THE UNITED STATES

APPELLANTS' APPENDIX

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DOCKET ENTRIES

(The Tax Court of the United States, No. 52987)

1954

May 18. Petition received and filed; taxpayer notified; fee paid.

May 19. Copy of petition served on General Counsel.

May 18.	Request for Circuit hearing in Detroit, Michigan filed by taxpayer; 5/21/54 granted.
July 6.	Answer filed by General Counsel.
July 8.	Copy of answer served on taxpayer, Detroit, Michigan.
Dec. 16.	Hearing set February 21, 1955, Detroit, Michigan.
	1955
Feb. 25.	Hearing had before Judge Withey, on merits; trial memorandum and stipulation of facts filed; briefs due May 11, 1955; replies due June 10, 1955.
Mar. 21.	Transcript of hearing 2/25/55 filed.
May 6.	Motion for extension to June 10, 1955 to file briefs with reply briefs due 30 days thereafter filed by General Counsel; 5/10/55 granted.
June 10.	Brief filed by taxpayer; printed; 6/13/55 copy served.
June 10.	Brief filed by General Counsel.
June 10.	Motion to change transcript, embodying change, filed by General Counsel, with no objection by petitioner thereon; 6/14/55 granted.
July 11.	Reply brief filed by taxpayer; copy served.
Dec. 6.	Notice reassigning proceeding to Judge Murdock, (Div. 3).
Dec. 30.	Findings of fact and opinion filed, Murdock, Judge; decision will be entered under Rule 50; 12/30/55 copy served.
	1956
Feb. 21.	Agreed computation for entry of decision filed.
Feb. 24.	Decision entered; Murdock, Judge, Div. 3.
Apr. 9.	Motion for re-hearing filed by petitioner; 4/9/56 denied.
Apr. 24.	Motion to fix amount of bond on appeal filed by petitioner.
Apr. 27.	Order fixing amount of bond at $10,000.00, entered.

May 14. Bond in the amount of $10,000.00 approved and filed.
May 14. Petition for review by United States Court of Appeals, Sixth Circuit, filed by petitioner.
May 14. Proof of service filed.
May 18. Petition for review by United States Court of Appeals, Sixth Circuit, filed by respondent.
May 18. Notice of filing petition for review sent to Morris Garvett, Esq., filed.
June 11. Order extending time for filing record on review and docketing petitions for review to August 11, 1956, entered.
July 30. Stipulation for dismissal of respondent's petition for review filed.
July 31. Order dismissing respondent's petition for review, entered.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties by their respective counsel, that the following facts shall be taken as true. This stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or the right to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. The petitioners filed joint income tax returns for the years in issue with the Collector of Internal Revenue for the District of Michigan, at Detroit, Michigan, and both petitioners are residents of the City of Detroit, State of Michigan.

2. On March 20, 1948, H. J. Johnson Company of Columbus, Ohio, and one Sam Breakstone of Cleveland, Ohio, entered into an agreement whereunder H. J. Johnson Company agreed to sell and Mr. Breakstone agreed to purchase 1,565 two motor 110 volt D. C. electric bomb hoists, motors being ½ h.p., each hoist being packed in the

original oak boxes, with accompanying electric cords, at the price of $15.00 each, f.o.b. cars Columbus, Ohio. The agreement recites payment by Mr. Breakstone of $1,000 at the time of execution thereof, and sets forth Mr. Breakstone's agreement to make additional payments at varying intervals, against which he was to receive partial shipments of the bomb hoists as provided for in the agreement, and his agreement to pay for all of the bomb hoists within 90 days of the date of the agreement. A photostatic copy of said agreement is attached hereto and made a part hereof as "Exhibit 1-A". Said bomb hoists were manufactured for use by the Armed Forces and were declared surplus some time following the conclusion of World War II.

3. On or about March 25, 1948, Mr. Breakstone made a $1,000 payment under the terms of the agreement of March 20, 1948, as evidenced by a photostatic copy of a letter from H. J. Johnson Company to Mr. Breakstone dated March 25, 1948, attached hereto as "Exhibit 2-B."

4. On April 15, 1948, H. J. Johnson Company wrote Mr. Breakstone acknowledging further receipts from him and payment through the date thereof of the sum of $4,000 under the contract, as evidenced by a photostatic copy of such letter attached hereto as "Exhibit 3-C."

5. In the interim between April 15, 1948, and April 30, 1948, Mr. Breakstone paid H. J. Johnson Company an additional $1,000 under the terms of the contract of March 20, 1948.

6. On April 13, 1948, Mr. Breakstone and one Joseph H. Tyroler and the petitioner, Morris W. Zack, entered into an agreement entitled "Agreement and Joint Venture," a copy of which is attached hereto as "Exhibit 4-D," wherein the basis of Mr. Tyroler's and Mr. Zack's participation in the purchase of the bomb hoists is set forth.

7. On April 30, 1954, H. J. Johnson Company entered into a letter agreement with Mr. Breakstone, a photostatic copy of which is attached hereto as "Exhibit 5-E." In said

letter agreement, H. J. Johnson Company acknowledged receipt of previous payments on the March 20, 1948 contract totaling $5,000.00, and said letter agreement sets forth the agreement of H. J. Johnson Company and Mr. Breakstone that a discount of $2,250.00 would be allowed on the March 20, 1948 contract, and said letter agreement also acknowledges payment of the adjusted balance owing, namely, $16,000.00, so that the total purchase price actually paid for the bomb hoists was $21,000.00.

8. On April 30, 1948, H. J. Johnson Company on the one hand, and Mr. Breakstone, Mr. Tyroler and Mr. Zack on the other hand, entered into an agreement entitled "Supplemental Agreement," a photostatic copy of which is attached hereto as "Exhibit 6-F," wherein the agreement with respect to the allowance of the $2,250.00 discount is set forth and receipt is acknowledged by H. J. Johnson Company of the sum of $16,000.00 paid by certified check drawn by Mr. Tyroler in favor of H. J. Johnson Company.

9. Although varying numbers of bomb hoists are referred to in the documents previously mentioned and in those hereafter described, the total number of bomb hoists which were received by Messrs. Breakstone, Tyroler and Zack was 1499.

10. On June 18, 1948, four bomb hoists were sold as samples to Gimbel Bros. for a price of $65.00 each, and one each was shipped to said concern in care of its stores at New York City, Philadelphia, Pennsylvania, Pittsburgh, Pennsylvania, and Milwaukee, Wisconsin. The net amount realized on such sale was $257.40, an allowance of $1.30 each having been made in the cases of the bomb hoists destined for the Pittsburgh and Milwaukee stores.

11. Gimbel Bros. did not purchase any other bomb hoists from Messrs. Breakstone, Tyroler or Zack.

12. On or about February 15, 1950, Mr. Tyroler granted an option to Taylor Machine Company to purchase 200 or 204 bomb hoists and $1,000 was paid for said option by Taylor Machine Company to Mr. Tyroler. Four bomb

hoists were sent to Taylor Machine Company. On August 28, 1950, Mr. Tyroler wrote to Taylor Machine Company, a copy of the carbon copy of that letter being attached hereto as "Exhibit 7-G," wherein it is stated that Taylor Machine Company had declined to exercise said option, and whereby Mr. Tyroler returned to that concern his check for $766.00, retaining $234.00 on account of the four bomb hoists which were sent to and retained by Taylor Machine Company.

13. On September 8, 1950, McGrath and Company purchased through Mr. Tyroler 200 of the bomb hoists for a purchase price of $100.00 each, as evidenced by the attached photostatic copy of a letter from McGrath and Company to Mr. Tyroler dated that day, marked "Exhibit 8-H."

14. On September 11, 1950, a certain agreement was entered into, a photostatic copy of which is attached hereto as "Exhibit 9-I." Said agreement was signed by Mr. Tyroler and by Mr. Breakstone, and Mr. Tyroler signed: "Morris W. Zack per J. H. Tyroler," all as Sellers, and by Parkersburg Junk Company, as Buyer, and whereunder it was agreed that a quantity of bomb hoists would be sold by the Sellers to the Buyer for a purchase price of $100.00 each.

15. Also on September 11, 1950, Mr. Tyroler and Mr. Breakstone entered into a letter agreement, a copy of which is attached hereto as "Exhibit 10-J." It is there recited, among other things, that in consideration of the payment by Mr. Tyroler of the sum of $26,250.00 to Mr. Breakstone, Mr. Breakstone sold and transferred to Mr. Tyroler a one-third interest in the bomb hoists and all of his interest in the said agreement (Exhibit 9-I hereto) entered into with Parkersburg Junk Company earlier that day.

16. Attached hereto as "Exhibit 11-K" is a bill of sale from Mr. Breakstone to Mr. Tyroler which recites the receipt of $26,250.00 by Mr. Breakstone from Mr. Tyroler, and whereunder Mr. Breakstone sold to Mr. Tyroler an undivided one-third interest in the bomb hoists.

17. Under the terms of the arrangement with Parkersburg Junk Company, Parkersburg Junk Company did not have to take the last sixteen bomb hoists. By letter dated October 9, 1950, a photostatic copy of which is attached hereto as "Exhibit 12-L," Parkersburg Junk Company advised Mr. Tyroler that it did not wish to take the last sixteen bomb hoists and requested payment of $1,600.00 therefor. There is attached hereto as "Exhibit 13-M," a check drawn on the Bank of Ohio dated October 11, 1950, to the order of Parkersburg Junk Co. which was endorsed on the reverse side—"Parkersburg Junk Company by Dave Cremer, Treasurer," and which was paid on October 16, 1950, the signature portion of which has been removed. The number of bomb hoists actually sold and delivered to Parkersburg Junk Company was 1275, as evidenced by the photostatic copy of a receipt therefor dated October 4, 1950, signed by that concern, and attached hereto as "Exhibit 14-N."

18. Summarizing the foregoing, the bomb hoists were sold as follows:

Date of Sale	Number Sold	Name of
June 18, 1948.....	4	Gimbel Bros.
February 15, 1950.....	4	Taylor Machine Company
September 8, 1950.....	200	McGrath and Company
September 11, 1950....1275		Parkersburg Junk Company

Sixteen bomb hoists were never sold and have been abandoned.

19. There are attached hereto the following additional documents:

	Exhibit
Check drawn on The Manufacturers National Bank of Detroit dated May 14, 1948, to the order of S. Breakstone and signed by Eugene M. Zack, numbered 445, in the amount of $3,500, which was endorsed on the reverse side: "S. Breakstone."	"15-O"

Check drawn on the Manufacturers National Bank of Detroit dated May 14, 1948, to the order of S. Breakstone and signed by Eugene M. Zack, numbered 446, in the amount of $500, which was endorsed on the reverse side: "S Breakstone." ..... "16-P"

20. There are attached hereto the following additional documents:

Check drawn on the Bank of Ohio dated October 17, 1950, numbered 10, to the order of Eugene M. Zack in the sum of $8,000, which was endorsed by him and deposited in The Manufacturers National Bank of Detroit and which was cancelled on October 20, 1950, and from which the signature portion has been removed. "17-Q"

Letter dated October 17, 1950, from Joseph H. Tyroler to Eugene M. Zack, enclosing check above referred to (Exhibit 17-Q)..... "18-R"

Check drawn on the Bank of Ohio, dated October 17, 1950, numbered 11, to the order of Samuel N. Zack in the sum of $8,000, which was endorsed by him and deposited in The Manufacturers National Bank of Detroit and which was cancelled on October 20, 1950, and from which the signature portion has been removed. "19-S"

Letter dated October 17, 1950, from Joseph H. Tyroler to Samuel N. Zack, enclosing the check above referred to (Exhibit 19-S)..... "20-T"

Check drawn on the Bank of Ohio, undated, numbered 12, to the order of Carl Schram in the sum of $8,000 which was endorsed by him and deposited in The Manufacturers National Bank of Detroit, and which was cancelled on October 20, 1950, and from which the signature portion has been removed..... "21-U"

Letter dated October 17, 1950, from Joseph H. Tyroler to Carl Schram, enclosing the check above referred to (Exhibit 21-U)..... "22-V"

21. In the month of April, 1948, Eugene M. Zack was 32 years of age, Samuel N. Zack was 27 years of age, and Carl Schram was 28 years of age. The petitioner, Morris W. Zack, was then President of M. W. Zack Metal Company, a Michigan corporation, and Eugene M. Zack was Vice President, and Samuel N. Zack was Treasurer, and Carl Schram was Assistant Secretary and Assistant Treasurer of the corporation.

22. The following United States income tax returns for the calendar year 1950 are attached hereto, with exhibit numbers as follows:

Taxpayers	Exhibit
Morris W. Zack and Sarah Zack.....	"23-W"
Eugene M. Zack and Marion Zack.....	"24-X"
Samuel N. Zack and Gloria Zack.....	"25-Y"
Carl Schram and Shirley Schram.....	"26-Z"

/s/ Charles L. Levin,
Counsel for Petitioners.

(Signed) R. P. Hertzog AJF
R. P. Hertzog,
Acting Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

Dated: February 21, 1955.

EXHIBIT 1-A

H. J. JOHNSON CO.
Surplus Materials
"The Boss Works Here"
38 East Spring Street
Columbus 15, Ohio

20 March 1948

AGREEMENT

H. J. Johnson Company of Columbus, Ohio and Mr. Sam Breakstone of 648 Huron Road, Cleveland 15, Ohio, hereby enter into an agreement as follows:

H. J. Johnson agrees to sell F.O.B., Columbus, Ohio and place on trucks or any other transportation desired by the buyer, approximately one thousand five hundred and sixty-five (1,565) two motor 110 volt D. C. electric hoists, motors being one-half horsepower, each hoist packed in original oak boxes in original crates guaranteed by the seller to be brand new, each box also contains one 25 ft. seven-way electric cord, one 50 ft. two-way electric cord and one 4-way electric control switch, at the price of $15.00 each, f.o.b., cars, Columbus, Ohio.

Mr. Breakstone hands us herewith Cashier's Check endorsed by him dated March 19, 1948 for $1,000.00. Mr. Breakstone agrees to give us another $1,000.00 not later than the night of March 25, 1948.

H. J. Johnson Company agrees to take immediately all the M-1 Servo Units, new, in cartons, from Mr. Breakstone at $1.00 each, f.o.b., Cleveland, Ohio. H. J. Johnson Company agrees to ship the equivalent amount of hoists covering the invoice on the Servo Units without further requirements of cash.

Mr. Sam Breakstone agrees to take out and pay for in advance beginning one week after Thursday, March 25,

1948 $1,000.00 worth of hoists and to continue taking out and paying for in advance $1,000.00 worth of hoists every ten days thereafter for a period of ninety days, making a total of nine shipments of $1,000.00 each. At the end of ninety days Mr. Sam Breakstone agrees to pay for and accept delivery immediately on all the remaining hoists at which time Mr. Breakstone is to have full credit for deposits originally made.

H. J. Johnson Company assumes no responsibility for non-delivery that might occur from loss from fire or water which Mr. Breakstone agrees to have insured in his name for his own protection.

It is further agreed that there will be no storage or any other charges of any nature whatsoever to Mr. Breakstone for the next ninety days. H. J. Johnson Company only assumes responsibility for burglary.

H. J. Johnson Company
/s/ H. J. Johnson
H. J. Johnson

Accepted:
/s/ Sam Breakstone
Sam Breakstone

EXHIBIT 4-D

Cable: Zacmet, Detroit or
Zacmet, New York

Private Siding M. C. R. R.

M. W. ZACK METAL COMPANY
Dealers in Metals
non-ferrous scrap and new metal

April 13, 1948

Telephone TAshmoo 5-7700
2130 Howard Street, Detroit 16, Michigan

AGREEMENT AND JOINT VENTURE

This transaction is as a result of a purchase made by Mr. Sam Breakstone of 648 Huron Road, Cleveland 15, Ohio, from the H. J. Johnson Co., 38 E. Spring Street, Columbus 15, Ohio, for approximately one thousand five hundred sixty-five (1565) two motor 110 volt D. C. electric hoists, motors being one-half horsepower, each hoist packed in original oak boxes in original crates guaranteed by the seller to be brand new, each box also contains one 25 ft. seven-way electric cord, one 50 ft. two-way electric cord and one 4-way electric control switch, at the price of $15.00 each, F.O.B. cars or trucks, Columbus, Ohio.

In consideration of Mr. Breakstone's purchase, he is to advance $3500.00, or not less than $2000.00 for this purchase. The balance is to be paid by Mr. J. H. Tyroler, 5305 Sweeney Avenue, Cleveland 4, Ohio, and Mr. M. W. Zack, 2130 Howard Street, Detroit 16, Michigan.

It is agreed between Mr. Breakstone, Mr. Tyroler, and Mr. Zack, that all profits and losses are to be equally divided. It is also agreed that whoever has the opportunity to make the sale of the above-mentioned material, should contact the other two parties of this agreement and notify them of the proposition for the sale.

It is also agreed that in the event the electric hoists have to be converted from D. C. to A. C., the cost for same will be paid by Mr. Tyroler and Mr. Zack.

In case of a partial sale, it is agreed that the monies derived from said sale will apply against the advance made by Mr. Tyroler and Mr. Zack.

In the event that the hoists have to be moved from Columbus, Ohio, to Cleveland, Ohio, or Detroit, Michigan, said hoists should be sent to Cleveland in the name of Mr. Tyroler, and to Detroit in the name of Mr. Zack.

/s/ J. H. Tyroler
J. H. Tyroler

/s/ Sam Breakstone
Sam Breakstone

/s/ M. W. Zack
M. W. Zack

MWZ:gjw

New York Office—80 Broad Street, New York 4, N. Y.—
Telephone Hanover 2-0125

* * * * *

EXHIBIT 6-F

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement entered into this 30th day of April, 1948 by and between H. J. Johnson, individually, and doing business as the H. J. Johnson Company, of Columbus, Ohio, hereinafter referred to as "Party of the First Part" and Sam Breakstone, J. H. Tyroler and M. W. Zack, of Cleveland, Ohio, hereinafter referred to as "Parties of the Second Part".

WITNESSETH:

Whereas, on or about the 20th day of March, 1948, the said Party of the First Part entered into an Agreement with the said Sam Breakstone whereby said Party of the First Part agreed to sell and deliver to the said Sam

Breakstone approximately Fifteen Hundred Sixty-Five (1565) two motor 110 volt, D. C. electric hoists; said motors being ½ H. P., each hoist packed in original oak boxes and in original crates, guaranteed by the Party of the First Part to be brand new; each box also containing one 25 ft. seven-way electric cord, one 30 ft. two-way electric cord and one-four-way electric control switch at the price of Fifteen Dollars ($15.00) each, F.O.B. cars, Columbus, Ohio, and,

Whereas, by the terms of said Agreement, Sam Breakstone agreed to pay for said motors, boxes and attachments, in the following manner:

> "To take out and pay for, in advance, beginning one week after Thursday, March 25, 1948, One Thousand Dollars ($1,000.00) worth of hoists and to continue taking out and paying for, in advance, One Thousand Dollars ($1,000.00) worth of hoists every ten (10) days thereafter, for a period of ninety (90) days, making a total of nine (9) shipments of One Thousand Dollars ($1,000.00) each. At the end of ninety (90) days, the said Sam Breakstone agreed to pay for and accept delivery on all remaining hoists at which time, Sam Breakstone is to receive full credit for any deposits originally made", and,

Whereas, under date of April 13, 1948, the said Sam Breakstone sold, transferred and assigned a one-third interest in said above referred to contract to J. H. Tyroler and a one-third interest to M. W. Zack and by reason thereof, the Parties of the Second Part now have an interest in the purchase of said aforementioned motors from the Party of the First Part, in accordance with the original Agreement entered into by and between Party of the First Part and Sam Breakstone, and, the said Party of the First Part hereby recognizes said assignment of interest to J. H. Tyroler and M. W. Zack from Sam Breakstone, and,

Whereas, the parties hereto have agreed to anticipate the schedule of payments specified in said original agreement upon the conditions hereinafter set forth.

Now, therefore, for the consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged by the parties hereto, it is agreed as follows:

1) Party of the First Part does hereby allow the parties of the Second Part a cash reduction or discount of Twenty-two Hundred Fifty Dollars ($2250.00) to be deducted from the total purchase price for said aforementioned motors, by reason of Second Part's agreement to anticipate the schedule of payments set forth in said original agreement.

2) The Party of the First Part does hereby acknowledge receipt of the sum of Sixteen Thousand Dollars ($16,000.00), by certified check of J. H. Tyroler, of Cleveland, Ohio; said amount represents the balance due and payment in full for the Fifteen Hundred Sixty-five (1565) motors, more fully set forth and described in the original agreement dated March 20, 1948, and entered into by and between the Party of the First Part and Sam Breakstone, (the sum of Five Thousand Dollars ($5,000.00) having heretofore been paid on account).

3) Party of the First Part shall and does hereby agree to deliver to the Parties of the Second Part the balance of the motor hoists heretofore purchased and which have not as yet been delivered to the said Parties of the Second Part.

4) Party of the First Part hereby agrees to execute and deliver to Parties of the Second Part a good and sufficient Bill of Sale, transferring said fifteen Hundred Sixty-five (1565) motors, as described in said original agreement and to deliver the same, together with possession of all of said property, free and clear from all incumbrances.

5) Party of the First Part further covenants and agrees to, and with the Parties of the Second Part,

that he is the lawful owner of all of said property and has good right to sell the same.

6) Party of the First Part further agrees to hold said motors in storage for the sole account of the Parties of the Second Part and to ship said motors only upon instructions from the Parties of the Second Part.

It is further understood and agreed by and between the parties hereto that the original agreement entered into on or about the 20th day of March, 1948, by and between the H. J. Johnson Company and Sam Breakstone shall remain in full force and effect except to the extent of the modifications set forth in this Supplemental Agreement. In all other respects said original agreement of March 20, 1948, shall continue in full force and effect and binding upon the parties thereto.

In witness whereof, the parties hereto have hereunto set their hands this 30th day of April, 1948.

H. J. Johnson Co.
By /s/ H. J. Johnson
(Party of the First Part)

/s/ Sam Breakstone
muz /s/ Morris W. Zack
/s/ J. H. Tyroler
(Parties of the Second Part)

Signed and Acknowledged
in the Presence of:

.....
.....
.....
.....
.....
(Signatures illegible)

EXHIBIT 7-G

Taylor Machine Company
2040 East 77th St.
Cleveland, Ohio
Attention: Mr. W. W. Taylor August 28, 1950

Dear Mr. Taylor:

In line with telephone conversation with our Mr. Rubin this morning respecting your option of February 15, 1950, inasmuch as this option has not been exercised, we are herewith notifying you of the revocation of said option and are handing you herewith our check for $766.00 which is the balance remaining to you.

Very truly yours,

Tyroler Metals, Inc.
J. H. Tyroler

JHT/fw

EXHIBIT 8-H

McGRATH AND COMPANY
St. Paul
Minnesota

September 8, 1950

Mr. Joseph H. Tyroler
Tyroler Metals Corporation
Cleveland, Ohio

Dear Mr. Tyroler:

Enclosed please find check in the amount of $20,000 drawn to McGrath and Company and Tyroler Metals Corporation. These funds are in payment of 200 C-6 bomb hoists, new and unused.

This is in accordance with my telephone conversation with your secretary at approximately 2:30 this afternoon (Minneapolis time).

Yours sincerely,

McGrath and Company
By John B. McGrath

EXHIBIT 9-I

AGREEMENT

This Agreement, made and concluded at Cleveland, Ohio, this 11th day of September, 1950, by and between Joseph H. Tyroler, Maurice W. Zack, and Sam Breakstone, hereinafter referred to as the Sellers, and Parkersburg Junk Company, a Corporation, hereinafter referred to as Buyer,

WITNESSETH:

Whereas, the Sellers are the owners of and desirous of selling:

> Approximately 1250 to 1500 Bomb Hoists complete with whatever accessories that are now attached to said electric hoists and being further described as the same merchandise heretofore acquired from H. J. Johnson & Company of Columbus, Ohio,

and,

Whereas, Buyer is desirous of purchasing said merchandise hereinabove described,

Now, Therefore, for and in consideration of the purchase price hereinbelow specified and other good and valuable considerations each to the other paid, it is mutually agreed as follows:

1. Sellers agree to sell and deliver and buyer agrees to accept and pay for:

Approximately 1250 to 1500 Bomb Hoists as hereinabove described, at a unit price of $100.00 per unit, F.O.B. Cleveland, Ohio.

2. Payment shall be made as follows:

(a) Fifty Thousand Dollars ($50,000.00) in cash, receipt of which is hereby acknowledged. The balance of the purchase price on or before October 11, 1950;

(b) The balance of the purchase price computed at the rate of $100.00 each for each electric hoist shall be paid on or before October 11, 1950, by certified check or cash;

(c) The parties hereto agree that the terms of payment and time of payment being essential to this Agreement, failure on the part of Buyer to pay the balance of the purchase price on the day herein specified, or its failure to comply with any of the other conditions set forth in this Agreement on its part to be performed, shall give to the Sellers the right to cancel this Agreement and the retention by them of Fifty Thousand Dollars ($50,000.00) as fixed, liquidated and ascertained damages, without proof of loss or damage.

(d) It is specifically understood and agreed that this sum of Fifty Thousand Dollars ($50,000.00) represents fixed and liquidated damages, and is in no way to be construed as a penalty for the non-performance by the Buyer of said Agreement. Inasmuch as the sale of this material will preclude and prevent Sellers from continuing negotiations with other interested parties for the sale of the hereinabove hoists and this fact is well known to the purchaser, it is specifically understood and agreed that the sum of Fifty Thousand Dollars ($50,000.00) paid as the consideration by purchaser for the aforesaid hoists shall, in the event the purchaser fails to pay the balance of the purchase price, constitute liquidated damages and shall be retained by Sellers and shall not under any circumstances revert to the purchasers or be considered in the nature of a penalty. The provision with respect to liquidated damages as herein set forth is agreed upon as fair and reasonable, any law to the contrary notwithstanding is hereby waived, because of difficulty in determining the actual damages that Sellers may sustain as a result of purchaser's breach of the contract.

(e) Upon the happening of the aforesaid, Sellers shall be free to negotiate for the sale of said hoists to anyone desiring to purchase the same upon such terms and conditions as the Sellers may conclude such negotiations.

3. Sellers shall convey title by proper Bill of Sale in favor of Buyer, or their nominees, and shall make available to Buyer said merchandise on or before October 11, 1950.

4. It is further understood and agreed that the purchaser shall have the right and privilege to have the above merchandise kept in storage at its present location without any additional charge to the purchaser for an additional thirty days from October 11, 1950. Said merchandise, however, shall be held in storage at the sole risk of the purchaser.

5. As a condition hereof, it is fully understood and agreed that said merchandise hereinabove described is not warranted for any particular or general purpose whatsoever by Sellers, and no persons has any authority to waive, alter or enlarge this Agreement or make any representations or warranty whatsoever respecting said merchandise. The Buyer acknowledges that it is familiar with the condition of said hereinabove described merchandise and further acknowledges that no representations or warranties whatsoever have been or are made by Sellers, their agents, employees or representatives; that said merchandise is being sold as is and where is.

6. In the event the purchaser should desire to obtain possession of any of said hoists hereinabove described prior to October 11, 1950, then in that event said purchaser shall have the right to order out any or all of said electric hoists upon the payment to the Sellers of the additional sum of $100.00 for each such unit so taken out, except, however, Buyer may obtain possession of six of said units without additional payment.

7. It is further agreed that the parties hereto shall arrange to have said merchandise insured against loss by fire

in the sum of $....., and the premium cost for said fire insurance shall be divided equally between the parties hereto.

8. The purchaser is hereby given the right to exhibit said bomb hoists to its prospective purchasers provided that said inspections shall be made at reasonable times.

In Witness Whereof, the parties hereto have set their hands the day and year first above mentioned.

/s/ Joseph H. Tyroler
/s/ Morris W. Zack per J. H. Tyroler
/s/ Sam Breakstone
Sellers

Parkersburg Junk Company
/s/ Martin Cremer
President.
/s/ Louis Cremer
Secretary.

Buyer

In presence of:
(Signature illegible)
(Signature illegible)

EXHIBIT 10-J

Cleveland, Ohio
Sept. 11, 1950

Mr. J. H. Tyroler
Tyroler Metals, Inc.,
5305 Sweeney Ave.
Cleveland, Ohio.

Gentlemen:

For your acceptance on or before noon of Sept. 11, 1950, I hereby offer to sell, assign, convey, transfer and set over unto you, all of my right, title and interest of whatsoever nature which I now have or may hereafter claim in and to the following described merchandise:

> Approximately 1485 two-motor 110 volt D. C. Electric Hoists; said motors being one-half horse power each, packed in original oak boxes or crates. Each crate or box contains one 25′ seven-way Electric cord, one 50′ two-way Electric cord, and one four-way Electric Control Switch,

and being further described as the certain electric hoists heretofore purchased from H. J. Johnson & Co. of Columbus, Ohio for the sum of twenty-six Thousand two hundred and fifty Dollars ($26250.00).

I further assign, transfer and set over unto you all of my right, title and interest in and to a certain "Agreement" entered into on or about the 13th day of April, 1948, by and between J. H. Tyroler and myself. It is further stipulated that said hereinabove referred to agreement dated April 13, 1948, shall, upon payment to me of the consideration herein set forth, be considered totally null and void, insofar as it relates to my interest therein and my rights to any profits therefrom.

In addition to the foregoing, I hereby acknowledge that I was indebted to J. H. Tyroler in the sum of $2,950.00, together with interest at the rate of 6% from and after the 18th. day of June, 1948; that I am indebted to M. W. Zack in the sum of $1800.00 together with interest thereon at the rate of 6% per annum from the 19th. day of June, 1949, and that I am indebted to Eugene Zack in the sum of $1704.92 together with interest thereon at the rate of 6% per annum from the 14th. day of May, 1948 and as part of the consideration for said sale, said notes are hereby cancelled.

All notes of indebtedness which I may have executed and delivered to the within named parties shall be returned to me at the time payment is made, and the Municipal Court cases Nos. 177695 and A177696 shall be dismissed at Defendants Cost.

The sum of Twenty-Six Thousand Dollars ($26,250.00) of the purchase shall be paid by check by noon of Sept. 11, 1950.

I further agree to immediately deliver over to you any and all of said electric hoists now in my possession and under my control amounting to 5 or 6 Hoists.

I furthermore do for myself, my heirs, executors, administrators and assigns, represent and warrant that the within mentioned merchandise is free and clear of any encumbrance whatsoever, and that I am the true and lawful owner thereof, and have good right and lawful authority to bargain and sell the same in the manner and form aforesaid, and that I will, and my heirs and assigns shall warrant and defend the same against all lawful claims and demands of all persons whatsoever.

I further do for myself, my heirs, executors, administrators and assigns, represent and warrant that I have not assigned, transferred, set over, or in any manner disposed of all or any part of the hereinabove referred to agreement dated the 13th. day of April, 1948.

If for any reason payment of J. H. Tyroler's Check by The Bank of Ohio is not paid by noon Sept. 11, 1950, this agreement as well as the agreement between J. H. Tyroler and Parkersburg Junk Co. is null and void and of no affect.

It is understood and agreed that Sam Breakstone has no further interest in and to the agreement entered into on Sept. 11, 1950 by and between J. H. Tyroler, Morris W. Zack, and Sam Breakstone, as the sellers and Parkersburg Junk Co. as purchaser, and whatever interest the said Sam Breakstone now has or may hereafter have in said contract is hereby asigned to Joseph H. Tyroler, providing above mentioned check is paid.

Sam Breakstone
Joseph H. Tyroler

Witnesses:
(Signatures Illegible)

EXHIBIT 11-K

BILL OF SALE

Know all Men by these Presents:

That Sam Breakstone of Cleveland, Ohio, the Grantor, for the consideration of Twenty-Six Thousand Two Hundred Fifty Dollars ($26,250.00) paid by J. H. Tyroler of Cleveland, Ohio, the Grantee, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, transfer and deliver unto the said Grantee the following described goods and chattels, to-wit: Undivided one-third interest in and to approximately 1485 two-motor 110 Volt D. C. Electric Hoists; said motors being one-half horse power each, packed in original oak boxes or crates. Each crate or box contains one 25' seven-way Electric cord, one 50' two-way Electric cord and one four-way Electric Control Switch.

To Have and to Hold the same unto the said Grantee, and his executors, administrators, and assigns forever.

And the said Grantor hereby covenant to and with the said Grantee that the said Grantor is the lawful owner of the above described goods and chattels; that the same are free from all incumbrances whatsoever; that said Grantor has good right to sell the same as aforesaid; and that said Grantor will warrant and defend the same against all lawful claims and demands whatsoever.

In Witness Whereof, the said Sam Breakstone has hereunto set his hand this 11th day of September, 1950.

Sam Breakstone

Signed and delivered in presence of:
A. J. Roth
John F. Day, Jr.

TRANSCRIPT OF TESTIMONY

* * * * *

(3) The Court: Do you gentlemen have any fact stipulation in this case?

Mr. Levin: Yes, your Honor.

The Court: What are your exhibit numbers?

Mr. Levin: 1-A, your Honor, through 26-Z.

The Court: The stipulation of fact, with the designated exhibits, may be received.

(Joint Exhibits 1-A through 26-Z were received in evidence.)

* * * * *

(6) The Clerk: Will you please state your name and address?

The Witness: Morris W. Zack, 4034 Sturtevant, Detroit, Michigan.

Direct Examination

By Mr. Levin:

Q. Mr. Zack, what was the nature of your employment in March, 1948?

A. President of the M. W.—

Q. Speak a little louder.

A. President of the M. W. Zack Metal Company.

Q. Have you been employed by that company continually (7) since that date?

A. Yes.

Q. What is the nature of the business of the M. W. Zack Metal Company?

A. Trading in non-ferrous material such as copper, brass, aluminum, zinc.

Q. Metals, generally?

A. Metals.

Q. Did you receive a telephone call in April of 1948 with regard to the purchases of some bomb hoists?

A. Yes, I did.

Q. Who telephoned you?

A. Mr. Tyroler of the Tyroler Metals Company, which is engaged in the same line of business.

Q. In the metal business?

A. Yes.

Q. When you say the metal business you are referring to metal as a raw material?

A. That's right.

Q. Where is the Tyroler Metals Company located?

A. Cleveland, Ohio.

Q. Is that a corporation?

A. Yes, sir.

Q. What did Mr. Tyroler say to you in the course of that telephone conversation?

(8) A. He called me up and he told me that he has a man in his office that has approximately sixteen hundred bomb hoists, and they cost about three hundred thirty dollars a piece to build, and he could buy them for fifteen dollars a piece, if I would be interested in taking part of them, and over the telephone he was telling me that the man brought in the hoists to them hasn't got the money to pay for it, his company would not be interested in buying those, and if I would put in half of the money he would put in half of the money, and we would split it three ways.

I have told him to wait a second—I am going to talk it over with my boys—which they were all in the office, and I told them while I was on the phone with him that there was an offer made to me to buy some bomb hoists, which they cost three hundred thirty dollars a piece. We can buy them at fifteen dollars. We have to pay about half the amount of money. Would they be interested, because I will not take it into the Zack Metal Company.

They said, "Dad, if you go into it, we will take part of it", and I have told that to Mr. Tyroler on the phone, and he told me that they are going to come in the next morning to Detroit, which they did.

Q. Who is "he"?

A. Tyroler and Mr. Breakstone, the fellow that came and offered those bomb hoists to him.

(9) Q. What is a bomb hoist, Mr. Zack?

A. A bomb hoist was built in the airplane during the war time when they had to load those bombs which weigh about a ton apiece, and they lift those bombs into the plane with that bomb hoist. It is a lift, an electric lift.

* * * * *

(10) Q. Now, on the following day you say Mr. Breakstone and Mr. Tyroler were to come to Detroit. Did they come to Detroit?

A. They came into Detroit.

* * * * *

Q. Did Mr. Tyroler and Mr. Breakstone come to Detroit? Did they come as Mr. Tyroler said they would?

A. Yes.

Q. Was there a discussion in Detroit with Mr. Breakstone and Mr. Tyroler, with regard to the transaction?

A. Yes.

Q. What was the nature of that discussion?

(11) A. When they came in the next morning into—Mr. Breakstone repeated the offer that he had made to Mr. Tyroler in front of me, and we have decided that we go to buy those hoists and Mr. Tyroler would pay half of the money, and I would pay half of the money, and Mr. Breakstone will get one-third of the profits after and when we will sell those hoists, and if there was any losses in it, he did not have any money to lose. The losses would be between Tyroler and myself.

Q. Who was to get the other two-thirds of the transaction? You say Mr. Breakstone was to have a third?

A. Mr. Tyroler and his associates, I guess, in Detroit. He said he was going to have somebody in, and I have told him that my boys and myself is going to take the other third.

Q. The other third. Did you enter into a written letter of understanding on that date with Mr. Breakstone and Mr. Tyroler?

A. When they were in Detroit? Yes.

Q. I would like to show you Exhibit 4-D, and ask you whether that is the letter of understanding you entered into.

A. This is the letter—

Q. Keep your voice up.

A. This is the letter that was written on my company's stationery, which we came into our understanding.

Q. Was there a lawyer present?

A. No.

(12) Q. Who dictated this?

A. Between the three of us, Breakstone, Tyroler and myself.

Q. It appears your initials are in the lower left-hand corner.

A. The secretary always when she writes an order, she puts her initials and mine.

Q. Did you pay any money on that occasion? This letter is dated April 13, 1948. On the date this letter was entered into did you pay any money over in connection with the transaction?

A. Yes, I give a check to Mr. Tyroler.

Q. Did you pay any money to Mr. Breakstone?

A. No.

Q. What was Mr. Tyroler to do with the check that you gave him?

A. He is supposed to go back to Cleveland and pay to the people that Breakstone bought the hoists from, to pay direct to them and get a receipt, or get delivery of the hoists.

Q. What was the amount of the check you gave to Mr. Tyroler?

A. Fifteen thousand dollars.

Q. What did that represent in relation to the cost of the deal?

A. Half of the deal.

* * * * *

(13) Q. Now, did Mr. Tyroler consummate the transaction with (14) the selling of the bomb hoists?

A. Yes.

Q. What was the name of the seller of the bomb hoists?

A. I believe they call them the Johnson Company.

Q. The Johnson Company. I would like to show you stipulation, Exhibit 6-F, which is entitled, "Supplemental agreement", and it is between the H. J. Johnson Company

on the one hand, and Sam Breakstone, J. H. Tyroler and M. W. Zack on the other hand, and ask you whether or not you recognize your signature on that agreement.

A. Yes, I do.

Q. That is your signature on the last page?

A. Yes.

Q. How did you sign that agreement?

A. That was mailed in to me by Tyroler, with all of the signatures.

Q. Keep your voice up.

A. That was mailed in to me by Mr. Tyroler, and after I received it I was talking to Tyroler on the phone, and then I signed it and sent it back, and he told me that he closed the deal, and he has to have that back.

Q. Where did you sign?

A. In Detroit.

Q. And it bears your initials, M. W. Z., before your signature?

(15) A. That was in pencil where I am to sign, and send it back.

* * * * *

Q. Did you ever have any discussion with H. J. Johnson Company in regard to this transaction?

A. No.

Q. Did you have any communications with him of any kind?

A. No.

Q. You never met them or wrote to them?

A. No.

Q. You never had any correspondence with them?

A. No.

Q. Mr. Zack, had you ever made any purchase of bomb hoists, other than this particular purchase, from H. J. Johnson (16) Company, personally?

A. No.

Q. Did either of your sons or your son-in-law make any purchase of bomb hoists other than this single purchase?

A. No.

Q. Keep your voice up.

A. Not to my knowledge.

Q. You probably would know about it if any such purchase was made by them, wouldn't you?

A. I think I would, yes.

Q. Did the Zack Metal Company ever make a purchase of bomb hoists at any time?

A. No.

Q. So as far as you know, neither the Zack Metal Company or your sons or your son-in-law or yourself ever purchased any bomb hoists other than this purchase from H. J. Johnson Company?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. Mr. Zack, had your sons or your son-in-law or you ever purchased any war surplus materials other than this purchase of bomb hoists?

A. Yes.

Q. Personally?

A. No, not personally.

(17) Q. Personally?

A. No.

Q. The Zack Metal Company has?

A. That's right.

Q. But you purchased, personally?

A. No.

Q. And neither of your sons or your son-in-law has made any such purchase?

A. Not to my knowledge.

Q. What kind of purchases would the Zack Metal Company make of war surplus materials?

A. We purchase material where we can turn it over at any time. We deal in raw materials. We can sell our material within twenty-four hours because there is an open market for it at any time.

Q. Describe the kind of war surplus materials the Zack Metal Company might buy?

A. We might buy material which contains metals where we can turn it over for scrap, melt it up.

Q. As metals?

A. As metals. We don't buy anything that is usable, to sell it as a finished product. Whatever we purchase we can sell it for remelting purposes.

The Court: Do you do any processing of scrap metals?

The Witness: Indirectly. We have the smelters, we (18) ship it to the smelters for processing on conversion.

The Court: Do you bale the metal?

The Witness: We shear and bale it. We melt it on conversion. We will send it to a smelter, and they will take the scrap and we will get the new metal back, virgin metal back.

By Mr. Levin:

Q. Mr. Zack, at the time you purchased the interest in the bomb hoists with your sons and son-in-law and the other gentlemen did you have any customers to sell them to?

A. No.

Q. Did either your sons or son-in-law?

A. No.

Q. Did Mr. Breakstone have any customers to sell the bomb hoists to?

A. No, if Mr. Breakstone would have a customer he probably wouldn't come to sell it to us.

Q. Mr. Zack, as far as you know, was there any market where the bomb hoists might be sold?

A. Not to my knowledge.

Q. You weren't aware of any?

A. No.

Q. Did you ever become aware of any market where the bomb hoists could be sold before their final disposition in September of 1950?

(19) A. Tyroler called me up that he has, somebody has an interest in those.

Q. You say Mr. Tyroler?

A. Mr. Tyroler called me up from Cleveland, and he told me that he has a customer, he thinks he has got a customer that will buy some of it.

Q. Who was that?

A. Taylor Machine Company.

Q. What did he say that the Taylor Machine Company was willing to do?

A. Taylor Machine Company wanted to buy two hundred hoists, and he told me they are willing to give him a thousand dollar deposit, and they will take four hoists for a trial and see what they can do with it, and that they work out satisfactory to them, they will take two hundred. He received the thousand dollars from them and he gave them four hoists.

Q. Do you recall what the purchase price was?

A. Between fifty-eight and sixty dollars. I don't know exactly. After—

Q. What was your reaction to Mr. Tyroler's relation to you of what Taylor Machine was willing to do?

A. I told him to go ahead and accept it.

Q. You told him to accept it, as far as you were concerned?

A. As far as I was concerned.

(20) Q. And as far as your sons and son-in-law were concerned?

A. Yes.

Q. Did you ever hear further in regard to the Taylor Machine transaction from Mr. Tyroler?

A. Yes, I did.

Q. What did he tell you?

A. A couple of weeks later he called me up and told me the Taylor Machine Company cannot use—cannot pick up the balance of the two hundred hoists, and they are willing to forfeit the thousand dollars that they gave, and I told him that we don't need that kind of money. He should only charge them for the four, and refund them the balance of the money, which he thought it was a good idea, and he did. He sent back the balance of the money to them.

Q. Mr. Zack, I think you may be wrong as to your times. I would like you to read stipulation, Exhibit 7-G. I would like to call your attention to the dates in it. You said Mr. Tyroler called you a couple of weeks later.

A. When I received that letter—

Q. You did receive that letter?

A. When it—this here letter—when it was brought in by Mr. Tyroler, they give them the hoist a couple of weeks ahead of time. This is the time when they are returning the money to him.

Q. This letter is dated August 28, 1950?

(21) A. Yes.

Q. And it states the option was given on February 15, 1950. Does that refresh your recollection? Does that refresh your recollection as to the dates?

A. August is the time when they refunded the money.

Q. Is that the time of your second conversation?

A. Yes, that's the time when they refunded the money to him at that time.

Q. Now, did you have a further conversation with Mr. Tyroler with regard to the disposition of the Bomb hoists subsequent to the return of the money to Taylor Machine Company?

A. I believe—

Q. Let me show you stipulation, Exhibit 8-H, which is a letter from the McGrath Company dated September 8, 1950. Does that refresh your recollection?

A. Yes, it does.

Q. Did you have a conversation with Tyroler in regard to McGrath Company?

A. Yes.

Q. What was the nature of that conversation?

A. He called me up and he told me he can make a sale to McGrath and Company on two hundred hoists.

Q. At what price?

A. At a hundred dollars apiece, and I told him he is a good salesman. He should go ahead and sell it, which he did.

(22) Q. When you say he was a good salesman, what do you mean by that?

A. If anybody could have sold those hoists, they was a genius, because we could not do anything there with them.

Q. Did you have a further conversation with Mr. Tyroler with regard to the sale of the bomb hoists after McGrath and Company transaction?

A. Yes, he called me up and he told me that the Parkersburg Junk Company wants to buy the remaining hoists from us.

Q. At what price?

A. At a hundred dollars apiece, and I told him to go ahead and accept it, as far as I am concerned.

Q. Did you later hear from Mr. Tyroler by telephone in regard to that?

A. Yes, I did.

Q. When did he call you, then?

A. He called me from Cleveland at the time the Parkersburg Junk Company were making the deal there, and they insist that Breakstone and Zack and Tyroler should sign the deal or something, whatever it happened to be. They needed my signature at that time, and they called me up and I gave the authority to Mr. Tyroler, to sign for me.

Q. Mr. Zack, I would like to show you stipulation, Exhibit 9-I, and I would like to call your attention to the signature page. Do you see your signature on that signature page?

(23) A. Not my signature. I see Morris W. Zack, but I didn't sign it.

Q. Who signed it?

A. Mr. Tyroler.

Q. It says what?

A. "Per Mr. Tyroler".

Q. Did you see this document before it was signed by Mr. Tyroler?

A. No.

Q. Did Mr. Tyroler read the contents of this document to you before he signed?

A. No.

Q. What did he tell you about it?

A. He told me that he has made a sale for the hoists and I have to sign at the time that they are making the sale. Then they must have been in an attorney's office—

Q. Why do you say they must have been in an attorney's office?

A. There was one client [sic; actually Kline] which I knew was an attorney. He got on the phone and he asked me if I will give the authorization to Tyroler, and then there was another person, I don't recall his name, after I talked to Tyroler, and I gave him the authority, and then I talked to Mr. Kline.

Q. Who was an attorney?

A. Who was an attorney.

(24) Q. In the same telephone conversation?

A. Yes, and I says, "I am giving the authority to Mr. Tyroler to sign for me", and there was another man, but I don't recall who he was, and he asked me the same thing, and I did.

Q. Mr. Zack, did Mr. Tyroler notify you of all potential purchasers for these bomb hoists?

A. Yes.

Q. Did you make sales to all of the persons who were potential customers?

A. Yes.

Q. Would you therefore say that the only potential customers for the bomb hoists that were ever obtained were the four companies to whom the sales were made? That is, Gimble Brothers, Taylor Machine Company, McGrath, and Parkersburg Junk Company?

A. That's right.

Q. There were never ever any other customers for the bomb hoists?

A. Not to my knowledge.

Q. Did you ever turn down an offer for the bomb hoists?

A. No.

Q. Did you personally ever solicit anybody to buy the bomb hoists?

A. No.

Q. Do you know—do you know whether the sales that were made to Taylor Machine Company, McGrath and Company and the (25) Parkersburg Junk Company came about from solicitations by Mr. Tyroler?

A. No.

Q. They did not?

A. I don't know. I don't know how they came about.

Q. You don't know how they came about?

A. No.

Q. Did you ever place any ads in newspapers or any publications for the sale of these bomb hoists?

A. No.

Q. As far as you know, did Mr. Tyroler ever make or place any ads in any newspapers for the sale of these bomb hoists?

A. Not to my knowledge.

Q. Or any other publications?

Mr. Nevitt: Well, your Honor, I think the proper question would be does he know whether or not Mr. Tyroler

By Mr. Levin:

Q. Do you know whether Mr. Tyroler ever—

A. Not to my knowledge.

Mr. Nevitt: You don't know whether he did or whether he didn't, is that right, Mr. Zack?

The Witness: He never charged me for any.

Mr. Nevitt: Okay.

By Mr. Levin:

(26) Q. Did you ever hire any salesmen to sell the bomb hoists?

A. No.

Q. Were Mr. Breakstone and Mr. Tyroler authorized to make sales of the bomb hoists without consulting you?

A. No.

Q. Did Mr. Tyroler consult you on each occasion before the bomb hoists were sold?

A. Yes.

Q. Did you consent to the sales?

A. Any offer, I consented.

Q. Any sales that were made, you consented in advance?

A. That's right.

Q. Did Mr. Breakstone or Mr. Tyroler have any authority whatsoever to act for you, your sons or son-in-law? In any respect?

A. No.

Q. You did give them specific authority—

A. This one occasion when I give him the authorization through the telephone because there was this sale and we didn't want to lose it.

Q. You also authorized him to make the sales, which he did?

A. Yes.

Q. After this sale to McGrath and Company—and this is (27) after transaction with Taylor Machine—the transaction with McGrath and Company—I will withdraw that question. I think the witness has already answered it. That question has been answered. Did Eugene Zack ever loan any money to Mr. Breakstone?

A. Yes.

Q. Will you describe how that came about?

A. The first time that we met Breakstone was when Tyroler came over to close the transaction that we did. Then probably within three or four weeks later Mr. Breakstone came into my office in Detroit and asked me if I can do him a favor, he needs a few thousand dollars, and I asked him what does he mean by a few thousand dollars, and he said he needed about four thousand dollars right away, and at the time when he asked me for it I didn't have enough, personally, money in there.

Q. When you say that you didn't have enough personal money, what do you mean?

A. In the bank. I didn't have enough for four thousand dollars.

Q. In your personal bank account?

A. My personal bank account, and Eugene was in the office and I asked him if he got four thousand dollars in the bank and he says yes, and I said, "You help out a customer that wants to borrow four thousand dollars. I like you should do him a favor".

Q. Was the fact that you and Mr. Breakstone were in a (28) transaction together any influence in making the loan of the money to him?

A. Oh, yes. I never knew Breakstone before, but I give him consideration that he brought that deal in, and I expected to make some money in it, and I could do him a favor, which we did.

Q. Was that one of the reasons that influenced Eugene Zack to make the loan to him?

A. Probably. And then, I asked him to do it, too.

The Court: Find out whether this witness can testify as to the reasons.

Mr. Levin: I will withdraw the question, your Honor.

By Mr. Levin:

Q. I don't know whether this was covered. Did either you or your son-in-law or sons ever learn of any person, other than the four persons to whom sales were made, who was interested ever in buying the bomb hoist?

A. As far as my knowledge, I would say no.

Q. You never learned of it?

A. I never learned it. They never mentioned anything to me, that there was an interest in those hoists.

Q. Did you ever participate in negotiations with McGrath and Company, Taylor Machine Company or Parkersburg Junk Company, or have any discussions with any of those companies in regard to the sales to them of any bomb hoists?

(29) A. No.

Q. Do you know whether your sons or son-in-law had any discussion with any of those companies?

A. No.

Q. You don't know?

A. I mean they did not contact them.

Q. They did not contact them?

A. I don't even know them, as far as that goes. I never met them.

Q. You had no contact with any of those companies?

A. No.

Q. Would you say that the investment on the money in the bomb hoist was a secure investment?

A. No, it was highly speculative.

Mr. Levin: No further questions.

The Court: Cross examine.

Cross Examination

By Mr. Nevitt:

* * * * *

(32) Q. Just for the record I will call this a joint venture. We don't admit what it was. You—did you tell Mr. Breakstone you had any kind of an arrangement with your sons?

A. If I tell Breakstone?

Q. Yes?

A. The money that I gave the check to Mr. Tyroler, Breakstone was present, and I told him that my sons and son-in-law is going to have a piece of it.

Q. You told Breakstone that?

A. Breakstone and Tyroler, both, at the same time.

* * * * *

(33) Q. Tyroler is a very good friend of yours, isn't he?

A. I hope he is.

Q. Where is he right now? Do you know where he is right now?

A. I know he is in Florida, but I received a letter from him that he is on the way to Cuba.

Q. At any rate, he is not—

A. Not in this Court room.

Q. Or available this morning?

A. When you say "available"—

The Court: That is a conclusion.

Mr. Nevitt: Yes; I will withdraw that.

By Mr. Nevitt:

Q. Suppose a buyer for the hoist had been found right after you had entered into this arrangement with Breakstone and Tyroler. Would you have sold them right away?

A. Yes.

Q. Suppose a buyer had been found any time during the (34) time you purchased them, and until you sold them, would you have sold them?

A. Sold them the same day, if we could get a customer.

Q. If you had gotten a customer you would have sold them the same day?

A. Yes.

Q. You bought them to resell?

A. That's right.

Q. And if Breakstone had found a customer you would have sold them?

A. We would have authorized him to sell.

Q. When Mr. Tyroler called you about Mr. Taylor's offer did you give him an answer right on the phone?

A. Yes, sir.

Q. Did you consult with your sons or son-in-law?

A. No, at that time I did not.

Q. When he called you in regard to the McGrath deal did you give him an answer right on the phone?

A. That's right.

Q. Did you consult your sons or son-in-law?

A. At that time I didn't—yes, I did, because Eugene was in the office at that time.

Q. Were the other two in the office?

A. I don't recall. I knew when I got the call from McGrath I know I called my oldest son, and I said, "We have a (35) customer at a hundred dollars a piece.

Q. Suppose he hadn't been in the office? Would you have given the authority?

A. I would have given the authority just the same.

Q. Now, what business is it you are now engaged in, Mr. Zack?

A. The Non-ferrous metal business.

Q. During the years in issue here you were engaged in that business?

A. That's right.

Q. Did you ever deal in war surplus goods?

A. Yes, we do.

Q. Just what kind of goods do you buy?

Mr. Levin: When you say— you say "you" and "we". Who do you mean?

Mr. Nevitt: The Zack Metal Company.

The Witness: The Zack Metal Company. We buy material where we can convert it, or we can at least sell it immediately, or convert it in some other material immediately, where we can turn it into salable items.

By Mr. Nevitt:

Q. If you can find a buyer immediately you will sell it immediately?

A. That's right.

Q. Just like the bomb hoists; if you could have found a (36) buyer you would have sold them?

A. Yes.

Q. If you buy wire do you ever resell it as wire?

A. We might resell it—we don't sell it by name. We might sell copper, which consists of wire. It may consist of solids or some metals. If it is wire we will mention it, wire, just by name. It isn't a question of wire.

Q. Did you ever buy wire from the Government?

A. Wire?

Q. War surplus?

A. Yes, we did.

Q. Did you resell it as wire, other than scrap?

A. Did we sell it as wire?

Q. Yes, to be used as wire.

A. We sell it. What the people does with it, I am not interested in what they do with it.

The Court: Witness, you are quibbling about that answer. Now, you just explained to counsel how you bought things, and changed them, and sold them, as something else. Now, counsel asked you a simple question. You said that you did or had purchased wire, as wire, from the Government?

The Witness: Yes.

The Court: Did you not say that?

The Witness: Yes.

The Court: He asked you, then, did you sell it as wire?

(37) The Witness: When we purchase it as wire we sell it as wire.

The Court: All right.

The Witness: It is only by name. There is a difference.

The Court: Then answer this question. Did you ever sell wire which you had purchased from the Government without reprocessing it?

The Witness: Yes.

The Court: All right.

By Mr. Nevitt:

Q. What else did you purchase from the Government?

A. What?

Q. What other things did you purchase from the Government? What other things, as war surplus items?

A. We bought some bolts, brass bolts, steel bolts, all kinds of shapes. You know, they call it different—we are buying it for the value, what it is worth for reselling it for scrap.

Q. Did you resell those bolts without processing them?

A. Yes.

Q. Was there anything else that you bought from the Government, any war surplus property?

A. Yes.

Q. What else?

(38) A. Sheet aluminum, aluminum rod, wire rods, anything the government is selling.

Q. Did you sell those without reprocessing them?

A. We sell everything without our own processing. You see, we have no smelter, but we—

Q. You don't know what the customer does with it?

A. That's right.

* * * * *

(40) Q. At any rate, a great deal of the material you purchased from the Government you resold in its natural state or in the state that you received it in?

A. That's right.

Q. Who owns the Zack Metal Company, Mr. Zack?

A. Stockholders, myself.

Q. How much of the stock do you own?

A. About sixty-seven per cent.

Q. Who owns the rest of the stock?

Mr. Garvett: Your Honor, I question the materiality of this, the private stockholdings of the M. W. Zack Metal Company, which is not a party to the proceeding. I don't know what it has to do with the issue.

The Court: This is cross-examination, and I think probably it is material.

(41) By Mr. Neyitt:

Q. Let me state it this way, Mr. Zack. Do your sons own stock in the Zack Metal Company?

A. Yes.

Q. How much do they own?

A. They own different. I couldn't say exactly. I think Eugene owns about eleven per cent, Sammie about probably eight or nine, and my wife owns part of it, and then I have some grandchildren, which they own some of it.

Q. Does your son-in-law own any?

A. No, my son-in-law don't own any.

Q. You employ salesmen?

A. Yes.

Q. Did they know you had these bomb hoists, the bomb hoist deal?

A. They knew about it.

Q. If they had come across any buyers would you have told Tyroler and Breakstone about it?

A. If they had come across any I probably would have asked them.

Q. They knew you had them and wanted to get rid of them?

A. They were aware—I have salesmen in New York and I have told them if they run into any they should call me up.

Q. They should what?

A. If he should run into a customer he should let me (42) know.

Q. For those bomb hoists?

A. Yes.

Q. And that was all during from the time you got them until you sold them?

A. Well, I only mentioned to him once. I don't know what—

Q. Yes. You, yourself, were on the lookout for buyers for the bomb hoists, I imagine, too. Weren't you?

A. I didn't go special to sell any because I didn't know who to sell them to.

Q. But if you had found—

A. If I run into you and you wanted to buy them I would sell them to you.

* * * * *

(43) *Re-direct Examination*

By Mr. Levin:

Q. Mr. Zack, when the M. W. Zack Metal Company bought copper wire, or other war surplus materials from the Government, did they buy it as metal or as a manufactured commodity?

(44) A. As a metal.

Q. When they sold it did they sell it as metal or a manufactured commodity?

A. As metal.

Q. Mr. Zack, do you know of your own knowledge whether any of your salesmen—that is, salesmen of the M. W. Zack Metal Company in New York—whether they

made any efforts to sell the bomb hoist? You know that of your own knowledge?

A. No, I don't.

Q. You don't know what they did?

A. No.

* * * * *

(48) ZACK, EUGENE, was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address.

The Witness: Eugene M. Zack. I live at 19386 Prairie Avenue.

Direct Examination

* * * * *

(50) Q. Were you present on the following day when Mr. Breakstone and Mr. Tyroler came to Detroit?

A. Yes.

* * * * *

Cross Examination

* * * * *

(55) Q. Were you present at that conference?

A. When Mr. Tyroler and Mr. Breakstone and my father were in his office?

Q. Yes.

A. Yes, I was.

Q. And just what was said amongst the parties there?

A. Well, the things that were said, that the three of them were going to go into the deal, and the whole deal was described, and about the money that had to be put up.

Q. Just what did Mr. Breakstone say? Do you recall anything he said?

A. Yes, he didn't say very much. He just described the hoists, where he was going to buy them, and what he had to pay for them, and where they were.

Q. Mr. Tyroler was there?

A. Yes, he was.

Q. What did Mr. Tyroler say?

A. Mr. Tyroler kept asking my father if he thought it was a good deal, and they should go into it.

* * * * *

(58) Mr. Levin: Your Honor, that concludes the testimony which we wish to offer. I would like to explain something to the Court. When the docket was called I represented to the Court we wished to have an elderly gentleman who was in Florida to testify, and I didn't want the case heard, if possible, until Wednesday. It was my understanding with Mr. Tyroler at that time he would come during this week and testify. I called him Monday evening and told him to make reservations to be here on Friday, and he said he would do so. After that he sent a telegram to Mr. Zack informing him that he had to go to Cuba instead, and wouldn't be here until sometime next week, and he sent him a letter saying that he must have been asleep when I, Chuck Levin, telephoned him, because he had forgotten about this Cuban trip, and he would, of course, be available next week.

I just thought I would explain to the Court why he isn't here in view of the representation I made.

The Court: I understand.

Mr. Nevitt: Mr. Breakstone.

BREAKSTONE, SAMUEL, was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: Samuel Breakstone.

* * * * *

(59) The Witness: Samuel Breakstone is the name, and the Colonial Hotel is where I live—Cleveland 15, Ohio.

The Court: Proceed.

Direct Examination

By Mr. Nevitt:

Q. Mr. Breakstone, did you ever have a conference in Detroit here at Mr. Zack's office at which Mr. Tyroler and yourself and Mr. Zack were present?

A. No, sir.

Q. What is your occupation, Mr. Breakstone?

A. Salesman.

Q. What do you sell?

A. Well, most anything, especially in bearings, ball bearings.

Q. Do you know Morris W. Zack?

A. Yes, sir.

Q. How do you happen to know him?

A. Well, I made this deal with Johnson.

Q. I don't mean to interrupt you, but why don't you just tell the Court in your own words exactly what went on in this (60) whole transaction, from the time you first contacted Johnson?

A. I was down in Columbus one time, and Mr. Johnson said, "Here is something you can really make some money out of." He told me about this quantity of approximately fifteen hundred or sixteen hundred—fifteen eighty-five, I think it was—of the hoists, and he said, "You can have them at fifteen dollars" He said, "If you hit it you will hit it good", so I said, "All right, we will make a deal", and I am supposed to put up a thousand dollars, which I did, and I had a certain length of time in which to pay it up, so much—I think so much a month, or I could pay more and within a certain time clean the whole thing up.

Things got going tough with me, and I couldn't make it, so one day I was talking to a man that works with Mr. Tyroler, a fellow by the name of Edinger, and he said, "Why don't you go and see Mr. Tyroler? Maybe he will go in on the deal with you", and I said, "All right." I went in and saw Mr. Tyroler, and I explained the whole thing to him, showed him the pictures of it, told him what I could buy them at, and he said, "I tell you what you

do", he said, "You go up to Detroit and speak to Mr. Zack". He give me Mr. Zack—I forget his initials—he give me his address, "and if he is agreeable, why, we will go into it".

I had already made additional payments besides the thousand dollars. I went up and saw Mr. Zack here in Detroit, (61) and I thought that I ought to have a fifty-fifty split on it because I had already started the thing. I had been working and spent money trying to sell them, and if we sold it there was going to be a good profit in it, and he said, "Well", he said, "no; there is three of us in. There is going to be a partnership of three. We will split it three ways." I was up against it, and I couldn't do anything else, and I had to agree to it, which I did, and the agreement was written up right there, and from then on we tried to sell them, and we sold a few here and there, and then I understood that Mr. Zack— later on I learned this. I think Mr. Zack, himself, told me.

Mr. Garvett: If I may interrupt. I have no objection to the witness testifying what Mr. Zack told him, but he started to say something that he understood.

The Court: Yes, witness, tell what happened; not what you thought.

The Witness: It was agreed then, an agreement was written up, we were to split the profits three ways, Mr. Zack, Mr. Tyroler and myself, and from then on I tried to sell—from that time on we tried to make sales. I sold a few here and there, and they did, too, and then it went up to a point where these fellows came in from Parkersburg, West Virginia—I don't recall their names right now, but the name of the company was the Parkersburg Junk Company—and an agreement was made whereby they bought them.

* * * * *

(62) Q. Were you trying to sell these bomb hoists from the time you acquired them [illegible] the time you sold them?

A. Yes, sir.

Q. What efforts did you make to sell them?

A. I had—I was given a copy of—

Mr. Garvett: May I interrupt? For the purpose of the record, on behalf of the Petitioners, I wish to object to this testimony as to what Mr. Breakstone did or tried to do.

Mr. Nevitt: On what ground?

Mr. Garvett: Which was not communicated to the petitioners.

The Court: Under petitioners' theory of the case, that objection is understandable, and would be good. However, under respondent's theory of the case, it is material. Under that theory it might be binding upon the petitioner. I will overrule the objection.

Mr. Nevitt: I would like to state for the record that Mr. Zack, himself, testified that had Mr. Breakstone found (63) a buyer, they would have sold them.

Mr. Garvett: That doesn't touch this question.

By Mr. Nevitt:

Q. What efforts did you make to sell these bomb hoists?

A. I had photostatic copies made of the various parts of the machine, the most important parts, and I think I had a hundred copies made, and I sent some of them to Mr. Zack's representative in New York. I give Mr. Tyroler some and I give Mr. Zack some.

Q. I will show you Respondent's Exhibit BB for identification.

A. Yes.

Q. I will ask you what that document is.

A. It is a letter I sent to the attention of Mr. Harold Roth of the M. W. Zack Metal Company, 84th Street, New York. Do you want me to read what I said in there?

The Court: That will be unnecessary to read it.

By Mr. Nevitt:

Q. What did you enclose with the letter?

A. I sent him thirty copies such as these.

Q. What is that?

A. That's an illustration of the various parts of the hoist. This shows how it was packed. This shows some more various parts.

Q. Why did you have that prepared?

(64) A. Well, I realized the deal was going to be—it was going to be a big deal. There was a lot of material sold, and I wanted to give them as full a description and as full an illustration of it as I possibly could, and I sent them out to many people. They were supposed to have done it, too, and it resulted in, oh, a sale here and there, maybe one or two at the time.

Mr. Garvett: I ask that be stricken. I don't think the witness should testify to conclusions.

Mr. Nevitt: What is a conclusion?

The Court: Yes, the witness has testified that certain actions on his part resulted in sales. The answer with respect to the result of the actions on his part may be stricken. He may testify what happened from then on, but not to the conclusion of what happened, or that it resulted from what he did.

By Mr. Nevitt:

Q. Did you distribute all of the catalogues you had printed?

A. All except a few.

Mr. Garvett: Will you fix the time, Mr. Nevitt?

By Mr. Nevitt:

Q. When did you prepare that catalogue?

A. Oh, I think—let me see. Probably—must have been a few months before this, before the date of this letter, (65) June 16, 1948.

* * * * *

Q. Was it after you dealt and talked to Mr. Tyroler and Mr. Zack that you had the catalogues prepared?

A. I am not sure, but I do think that I went ahead and made them, had them made up, set up.

Q. When were most of them distributed?

A. After the deal was entered into between Mr. Zack and Mr. Tyroler and myself.

* * * * *

(66) By Mr. Nevitt:

Q. I will show you Respondent's Exhibit CC for identification, Mr. Breakstone, and ask you what that document is.

A. It is a photograph of a type C-6 bomb hoist, left rear view. It shows how it operates.

Q. And this is the catalogue that you have referred to (67) previously?

A. Yes.

Mr. Nevitt: I will offer Respondent's Exhibit CC in evidence at this time.

Mr. Garvett: We have no objection.

The Court: It may be received.

(Respondent's Exhibit CC was received in evidence.)

By Mr. Nevitt:

Q. Did you write any letters in attempting to sell the bomb hoist?

A. Yes.

* * * * *

(69) Q. You wrote letters, didn't you, trying to sell these bomb hoists?

A. Yes.

Mr. Garvett: That is leading.

The Court: Yes.

By Mr. Nevitt:

Q. Did you write letters to anyone concerning the bomb hoists?

A. Yes.

Q. What were contained in those letters?

A. Descriptions of the hoists, of the bomb hoists, and—

Mr. Garvett: I don't hear the answer.

The Court: He said description of the bomb hoist, and—

The Witness: —and their uses.

(70) By Mr. Nevitt:

Q. Why did you write those letters?

A. In order to try to sell them.

Q. Were you trying to sell the bomb hoists from the time they were first acquired until they were finally sold?

A. Yes, sir.

Q. Around forty-eight—'48, '49 and '50—those years—you had them on display?

Mr. Garvett: I object to that, your Honor. The witness is testifying to conclusions, and he ought to be asked what he did.

The Court: No, I think that is a proper question to this witness, who is a salesman. He ought to know, and peculiarly, as to whether or not what he was doing was an attempt to sell. Overrule the objection.

By Mr. Nevitt:

Q. Did you have them on display in your place of business?

A. Yes, sir.

Q. Will you describe how the final transaction with Parkersburg came about?

A. The two boys—two brothers from Parkersburg—came—I don't recall their names now, but they came in. They heard that I had them to sell.

The Court: Now, just a moment. Just tell what happened.

(71) The Witness: Well, they came in.

The Court: Just a minute.

The Witness: Pardon me. I am sorry.

The Court: Tell what happened, and do not tell what somebody else thought, or you think somebody else thought.

The Witness: All right. They came in and we sold them to them.

By Mr. Nevitt:

Q. At your place of business?

A. No, the sale was not completed there, but they were ready to buy them, and on a Sunday morning we went up to Mr. Tyroler's attorney there in Cleveland, Peter Kline, and the deal was completed up there.

Mr. Nevitt: I have no further questions.

The Court: Cross examine.

Cross Examination

By Mr. Garvett:

Q. Mr. Breakstone, how old are you?

A. I am seventy.

Q. This transaction took place when?

A. Oh, about 1948, I believe, 1949.

Q. When did you first meet Mr. Zack?

A. The first time I met him was right in his own office, in Detroit here. I forget what the address was.

Q. Do you remember the date?

(72) A. No, sir.

Q. Do you remember in what year it was?

A. I imagine it was either in '48 or '49.

Q. Do you remember? Do you remember without looking at any documents?

A. I remember that I saw him in his office.

Q. Yes. I am asking you now whether you remember in what year you saw him in his office.

A. I don't exactly remember that.

Q. Do you remember what month of the year it was?

A. I don't remember that.

Q. Do you remember what season of the year it was?

A. I don't even remember that.

Q. But you remember that Mr. Tyroler was not there?

A. Yes, sir.

Q. How much money did you have in this deal?

A. Well, I made my first payment of a thousand dollars, and then I made an additional payment. I don't recall what it all was. And then I couldn't go on any further.

Q. How long did you have any investment in the deal?

A. Oh, I don't know. Possibly about four or five months. I am not sure.

Q. Do you remember that you made your transaction with Johnson?

A. Yes, sir.

(73) Q. —In March of 1948?

A. Yes, sir.

Q. How much money did you pay to Johnson at that time?

A. A thousand dollars.

Q. When did you pay Johnson some more money?

A. Oh, probably about—anywhere sometime within the next month, probably.

Q. Do you remember how much it was?

A. I think about some seven hundred fifty dollars.

Q. Did you pay Johnson any more money?

A. I am not sure.

Mr. Nevitt: Would counsel for the petitioner point out how this is material?

Mr. Garvett: This witness has testified that he was hard-pressed, and has tried to create the impression here—

The Court: I understand what the situation is. This is cross examination, and proper cross examination. Proceed.

By Mr. Garvett:

Q. Are we to understand, then, that you had a total of seventeen hundred fifty dollars invested in this transaction?

A. I think so, yes.

Q. And do you remember—strike that, please. So when you met with Mr. Tyroler in Cleveland, and subsequently (74) with Mr. Zack in Detroit, your total investment was seventeen hundred and fifty dollars, is that correct?

A. I think so.

Q. When did you get that money back?

A. Well, when the thing was settled.

Q. Then you borrowed some money from Mr. Sam Zack, or Eugene Zack,—is that correct?

A. I actually borrowed it from his father, and he told his sons to give him a check for so much money.

Q. And you were given, then, a third interest in these bomb hoists for this money which you invested, is that correct?

A. Well, I wasn't given.

Q. Well, what do you mean—that you weren't given?

A. I mean by that—the deal originally was mine.

Q. But you couldn't consummate the deal, could you?

A. Yes, that's right. I could not consummate it.

Q. You didn't have the money?

A. That's right.

Q. You had invested about seventeen hundred fifty dollars, had you?

A. And a lot of time.

Q. And you couldn't go through with the deal?

A. That's right.

Q. So you were faced with the possibility or probability of losing your seventeen hundred fifty dollars, were you not?

(75) A. Yes.

Q. So you asked these gentlemen to put up the money to finance the deal?

A. I asked them if they wanted to.

Q. And they said they did?

A. Yes.

Q. And they did put up the money, did they not?

A. Yes.

Q. And they gave you—or you retained a third interest in this deal for seventeen hundred fifty dollars?

A. Yes.

Q. How much money did they put in?

A. Well, let's see. I think later on Johnson gave me—

Q. How much?

A. He gave me a reduction. They put up about fifteen hundred times twelve and a half dollars. There, less what I paid.

Q. They put in about thirty thousand dollars, didn't they?

A. Well, let's see. Figure it out. Fifteen hundred times twelve is how much? About eighteen thousand, isn't it? Eighteen or nineteen—twenty thousand dollars. Anyhow, Mr. Peter Kline came down there with me and give Johnson a check for the balance, and as I recall, it was about twenty thousand dollars.

Q. Well, they had very substantially more money in the (76) deal than you had, isn't that right?

A. Yes.

Q. But you had an equal interest with them, that is correct, isn't it?

A. I had a third interest.

Q. And that's all each one of them had, isn't it? Isn't that right?

A. That's right.

Q. Now, you said that you had sold a few here and there?

A. That's right.

Q. To whom did you sell them?

A. I don't recall.

Q. As a matter of fact, you didn't sell any, did you?

A. I did sell some.

Q. To whom?

A. I don't know. I have no records.

Q. How many did you sell?

A. I don't know. I may have sold maybe ten or fifteen, or maybe only five. I don't know.

Q. To how many people did you sell them?

A. Probably to about maybe four or five.

Q. You don't know the names of these people?

A. No, I don't recall them. All my records were seized.

Q. They were seized by whom?

A. Well, I give a fellow a note, and he went and grabbed (77) the whole thing, including my records and everything, so I had no way of refreshing myself.

Q. Do you know whether they were sold to individuals?

A. Mostly to individuals, yes.

Q. Any to corporations?

A. There may have been one or two corporations, yes.

Q. Do you know where these people were located? Who bought them?

A. There was one in Cleveland.

Q. One in Cleveland?

A. Yes.

Q. What business was he in?

A. I am not sure, but I think it is the concern that makes these—I think it was them—the concern that makes, oh, these stands you drop a nickel in when you park your car.

Q. Parking meters?

A. Yes.

Q. They bought bomb hoists?

A. I think they bought one, yes.

Q. Who else bought them?

A. I don't recall.

Q. I am referring now to the kind of business operated. Now, who did tell you that?

The Court: I have seen parking meters where a bomb hoist could well be used.

(78) Mr. Garvett: I must plead ignorance, your Honor.

By Mr. Garvett:

Q. Did you know anything about the sale of bomb hoists to Gimble Brothers in New York?

A. Yes.

Q. How many were sold?

A. I think maybe probably no more than two or three.

Q. Who sold them?

A. I did.

Q. So that is one sale that you made?

A. Yes.

Q. Do you know that four bomb hoists were sold to the Taylor Machine Company?

A. I think Mr. Tyroler sold them to them. I made the sale, but Mr. Tyroler I think delivered them.

Q. Who is the Taylor—

A. Taylor Machine Company originally made some of these, and the Master Electric Company down in Dayton also made some of them.

Q. But these bomb hoists were made by Taylor Machine Company, isn't that right?

A. I say part of them were made.

Q. All right, and Taylor Machine Company knew where the bomb hoists were, isn't that correct?

A. Yes.

(79) Q. And what was the occasion, do you know, for Taylor Machine Company wanting to repurchase the bomb hoists which they had manufactured?

A. They may have—I don't recall fully, but they may have bought that for parts. They may have bought them—it is thought they may make some more for the Government.

Q. You didn't sell them to Taylor Machine Company, did you, Mr. Breakstone?

A. Sure.

Q. They came and asked to purchase them, isn't that a fact?

A. I don't know how you figure that, because I knew Mr. Taylor, and I called on him with regard to other things; in fact, I got those photographic descriptions—I got that from Mr. Taylor.

Q. Mr. Breakstone, isn't it a fact that Taylor Machine Company approached either you or Mr. Tyroler and said that it wanted an option to purchase some two hundred bomb hoists?

A. I don't know. If that—I think if there is any connection there, it might have been due to the fact that Mr.

Tyroler bought scrap, bought scrap material from the Taylor Machine Company, and I think Mr. Tyroler at one time said he knew Mr. Taylor well.

Q. And Mr. Taylor knew, did he not, that Mr. Tyroler had these bomb hoists?

(80) A. He knew that he had an interest in them, yes.

Q. Yes, and isn't it a fact that Mr. Taylor approached Mr. Tyroler with the proposition to purchase these bomb hoists—or some two hundred?

A. You know more about it than I do, because I don't know it is a fact.

Q. But it is a fact that you didn't approach Mr. Taylor to sell him the bomb hoists, is it?

A. I did.

Mr. Nevitt: I think this subject has been pretty well exhausted.

The Witness: I certainly did. Mr. Tyroler wouldn't move off the seat there in the office. I had to go and do all of the leg work.

By Mr. Garvett:

Q. Do you know some two hundred of these bomb hoists were sold to the McGrath Company?

A. I think that is so, yes.

Q. Did you have anything to do with that sale?

A. I gave the name of McGrath, yes.

Q. To whom?

A. I think to Mr. Tyroler.

Q. And that's all you had to do with it?

A. Well, all right. What else would you want me to do?

The Court: Just a minute, witness. There is no use in (81) your arguing with counsel. Just answer the question as shortly and as concisely as you can. Is that all you had to do with it?

The Witness: I don't recall fully. I say my records were seized. I had no means of refreshing myself.

The Court: All right.

The Witness: I do think I was instrumental in some manner in selling those to McGrath.

By Mr. Garvett:

Q. Do you know where the McGrath Company is located?

A. They are somewhere out west.

Q. Do you know where?

A. I don't recall.

Q. You know that some fourteen hundred were sold—twelve hundred were sold to the Parkersburg Junk Company?

A. Yes, that is right.

Q. You had nothing to do with that sale, did you?

A. The hell I didn't. Pardon me. I am sorry. Yes, I did. I had everything to do with it. I was instrumental in selling those.

Q. Prior to the time that you met Mr. Zack and Mr. Tyroler you didn't sell any of these, did you?

A. I did sell some.

Q. To whom did you sell, and how many?

A. Well, all right, you have got the records. Look it up.

(82) Q. I have told you, I have given you the information from my records.

A. As I say, all of my records were seized. I have no means of telling.

The Court: Well, I think you have pursued that sufficiently. Apparently he doesn't know.

Mr. Garvett: Yes.

Mr. Nevitt: I think so, too, your Honor. Just to make it unanimous.

By Mr. Garvett:

Q. I show you Respondent's Exhibit CC. That's the photostat of the bomb hoists?

A. Yes.

Q. It has your name?

A. Yes.

Q. Printed on the bottom there?

A. Yes.

Q. When did you have that done?

A. Oh, I don't know. Sometime in '48 or '49.

Q. Do you know, then, these photostats—strike that, please. Do you know when you came into the possession of the circulars of which this is a photostat, of which exhibit CC is a photostat?

A. Somewhere in '48 or '49.

Q. You came into the possession of them before you made (83) this deal with Mr. Tyroler and Mr. Zack, is that right?

A. Yes, sir.

* * * * *

(84) Q. Where is your place of business?

A. I haven't any more business. I operate from the place I live, the Colonial Hotel.

Q. When did you last have a place of business?

A. Oh, about—I think about four or five months ago.

Q. Where was your place of business in 1948?

A. I am not sure. It may have been—it may have been on Huron Road, and from there I moved to West 25th Street. It may have been at that place.

Q. What kind of a place was it?

A. It was just a store. West 25th was a store, and I carried stock there.

Q. What kind of stock?

A. Well, anything mechanical. It may have been molders, it may have been ball bearings, mostly ball-bearings, roller bearings.

Q. You said you displayed the bomb hoists in your place (85) of business?

A. That's right.

Q. How many did you have there?

A. I probably had maybe anywhere from ten to fifteen of them.

Q. How big was your place of business?

A. Well, I would say about forty by about seventy-five.

Q. Forty feet by about seventy-five feet?

A. Yes.

* * * * *

Q. How big was a bomb hoist?

A. Well, I would say it was about, maybe twenty-four—between twenty-four by twenty-four—

Q. Talking about feet?

(86) A. Yes, that is the box that it was in.

Mr. Nevitt: Do you mean feet or inches?.

The Witness: Inches.

By Mr. Garvett:

Q. These bomb hoists were in the original boxes, were they not?

A. That's right.

Q. They had never been unpacked?

A. No, very few of them had. There were a few, there were a few extra that were not in boxes.

Q. When did you place those bomb hoists in your store?

A. I don't recall.

Q. Are you sure you had bomb hoists in your store?

A. I am positive.

Q. Isn't it a fact that all of these bomb hoists were located in Columbus, Ohio on the premises of the H. J. Johnson Company, from whom they were purchased?

A. At a warehouse of his, that is right; all except those few that I had in my place as samples.

Q. Isn't it a fact that all of the bomb hoists covered by this agreement were shipped to Mr. Tyroler in Cleveland?

A. All except these few that I had as samples.

Q. And you don't know how many you had?

A. I would say I had between ten and fifteen of them.

Q. Did anybody ever seek to purchase any of them?

(87) A. The negotiations came to naught. Oh, I would try, I would try to sell them all of the time.

Q. Did anybody ever walk into your store and say, "I want to buy a bomb hoist"?

A. No, they don't sell that easy.

Q. I show you the stipulation, Exhibit 4-D. Do you recognize your signature there?

A. Yes.

Q. What other signatures appear there?

A. J. H. Tyroler, and then my name, and then M. W. Zack.

Q. Do you remember when that was signed?

A. No, sir, I do not.

Q. Do you remember where it was signed?

A. I do not. I think it was sent in to Cleveland, and I think I signed it with Mister—no, I think I signed it in Mr. Zack's office right here.

Q. And Mr. Tyroler signed it, too, at that time, didn't he?

A. No, he didn't. He was never in Detroit with me.

Q. Don't you mean that you didn't come to Detroit with him?

A. Yes, I mean exactly that.

Q. You did not come to Detroit with him? I mean you did not travel to Detroit with him?

A. I did not travel to Detroit with him, and I did not (88) meet him here in Detroit. I did not see him in Detroit.

Q. It was testified this morning that Mr. Eugene Zack made a loan to you?

A. That's right.

Q. Isn't it a fact that Mr. Morris W. Zack also made a loan to you?

A. Yes.

Q. Do you remember when that was?

A. No.

Q. Was it about the time that Eugene made the loan to you?

A. About what time was that?

Q. Well, you tell me. When did Eugene make the loan to you?

A. I don't remember.

Q. Was it about the time this transaction was entered into between you and Zack and Tyroler?

A. I don't remember exactly when it was. It wasn't at that same time, no.

Q. How long after was it, do you remember?

A. I don't recall.

Q. Well, do you remember how long after Eugene made the loan to you that Morris W. Zack made a loan to you?

A. I don't remember which was first and which was second.

(89) Q. Do you remember how much time elapsed between the two loans?

A. No, I don't.

Q. Do you remember how much the second loan was?

A. I don't exactly remember that, either.

Q. Do you remember when you paid it back?

A. I don't remember that.

Q. Do you remember whether you paid it back?

A. Yes.

Q. Did you pay it back voluntarily?

A. No, I think they sued me for it.

Q. Had to sue you for it?

A. Didn't have to, but they did. They were protected with all of the hoists. That's why they let me have it. What do you think they would do it for?

Q. Did you give them your interest in the hoist as security?

A. That was the understanding, sure. They were in full control of it. As a matter of fact—

Q. Excuse me, Mr. Breakstone. Don't tell me what the understanding was. Tell me what was done or what was said. Did you execute any papers as security?

A. I don't recall whether I did or not.

Q. Did you give a note for the amount?

A. I think I did.

(90) Q. If I told you you gave a note dated July 19, 1949 would that refresh your recollection at all?

A. No, it wouldn't. The thing was this: When the thing was settled up—

Q. Mrs. Zack—Mr. Breakstone, do you remember you borrowed eighteen hundred dollars from Mr. M. W. Zack?

A. I don't remember exactly the amount, but I remember I borrowed it, yes.

Mr. Garvett: Will you mark this as an exhibit, please.

The Clerk: It will be 27 for identification.

(Petitioner's Exhibit Number 27 was marked for identification.)

Mr. Nevitt: I will object to the introduction of this into evidence, your Honor. It is not certified in accordance with Section 1738 3926 U. S. Code annotated.

The Court: So far there has been no offer.

Mr. Garvett: I offer Petitioner's Exhibit 27 in evidence, which is a certified copy of the proceedings in the Municipal Court of Cleveland, Cuyahoga County, in the State of Ohio in an action entitled—I don't want to get it on record without the Court seeing it first.

The Court: Will you hand it to me, please, Mr. Clerk? I will overrule your objection and receive it in evidence. Petitioner's Exhibit 27.

(91) (Petitioner's Exhibit Number 27 was received in evidence.)

Mr. Nevitt: I would like to make an additional objection on the ground of relevancy, your Honor.

The Court: I will still overrule your objection.

The Clerk: Exhibit 27.

Mr. Garvett: No further questions.

The Court: Do you have any further direct?

Mr. Nevitt: I have just a few more questions.

Re-direct Examination

By Mr. Nevitt:

Q. Mr. Breakstone, will you please state just in your own words all that you remember about these loans from Mr. Eugene Zack and from Mr. Morris Zack?

A. Well, I recall getting loans and the fact that they had a big interest in the hoist, it was sufficient for them to give me those loans. They were safe, and they knew it, because they had full control of it.

Q. You don't deny that you borrowed this money from the Zacks?

A. No, I don't.

Q. Was that during the summer of '48?

A. I don't recall the date, exactly.

Q. It was after you entered into this deal, though?

A. Yes, sir.

(92) Q. Was it before Rosh Hoshana of that year?

A. I am not much on remembering those things. I know what it is pretty well. It is the Jewish Holidays.

Q. Were you aware that Mr. Zack had any kind of arrangements with his sons or son-in-law?

A. No.

Q. Did Mr. Zack ever tell you he had any such arrangement with his sons or son-in-law?

A. No, sir.

Q. You knew nothing about it?

A. No, sir.

Q. Until I talked to you the other day?

A. That's right.

* * * * *

PETITIONER'S EXHIBIT 27

IN THE MUNICIPAL COURT OF CLEVELAND

The State of Ohio,
Cuyahoga County,
City of Cleveland—ss.

Morris W. Zack 965 Union Commerce Bldg., v. Sam Breakstone 1736 W. 25th St.,	July Term, 1950 No. A-177696 Contract; Money Only.

Aug 17, 1950

Petition, in words and figures filed, to-wit:

IN THE MUNICIPAL COURT OF CLEVELAND

Case No. A-177696

PETITION

State of Ohio,
Cuyahoga County—ss.

Morris W. Zack
965 Union Commerce Bldg.,
Cleveland, Ohio
Plaintiff

v.

Sam Breakstone
1736 West 25th Street,
Cleveland, Ohio
Defendant

For his cause of action against the defendant, plaintiff says that there is due him from the defendant the sum of Eighteen Hundred Dollars ($1800.00) together with interest, thereon at the rate of six per cent (6%) per annum

from July 19, 1949 upon a promissory note of which the following is a copy, there being no endorsements thereon:

"$1800.00 Cleveland, Ohio July 19, 1949

Thirty days after date I promise to pay to the order of M. W. Zack
Eighteen Hundred and no/100 Dollars
Payable at National City Bank, Cleveland, Ohio
Value received with interest at 6 per cent per annum
No. 13298 Due 8/18/49

/s/ S. Breakstone

Wherefore, plaintiff prays for judgment against defendant in the sum of Eighteen Hundred Dollars ($1800.-00) with interest at six per cent per annum from July 19, 1949.

Klein & Klein
Klein & Klein
Attorneys for Plaintiff
965 Union Commerce Bldg.,
CH-10244

State of Ohio,
Cuyahoga County—ss.

Peter E. Klein, being first duly sworn, deposes and says that he is the attorney for plaintiff herein; that the cause of action contained in the foregoing petition is predicated upon an instrument in writing in his possession and that the facts in said petition contained are true as he verily believes.

P. E. Klein /s/

Sworn to before me and subscribed in my presence this 17th day of August, 1950.

Dorothy G. Deeks, /s/
Notary Public (SEAL)

Tax fee

Aug 17, 1950
Summons issued.

Aug 18, 1950:
Summons returned endorsed: Personal service.

Sep 2, 1950:
Answer filed.

Feb 13, 1951:
On application of the plaintiff this cause is dismissed without prejudice at the plaintiff's costs for which judgment is rendered.

Journal 58 page 203

The State of Ohio
Cuyahoga County
City of Cleveland—ss.

I, Johnny Kilbane, Clerk of Cleveland Municipal Court and in whose custody the Files, Journals, and Records of said Court are required by the laws of the State of Ohio, to be kept; hereby certify that the foregoing is taken and copied from Civil Docket No. 2356 Page A-177696 of the proceedings of the said Municipal Court, and that said foregoing copy has been compared by me with the original entries on said Civil Docket and that the same is a correct transcript thereof.

In Witness Whereof, I do hereto subscribe my name officially, and affix the seal of said Court, at Cleveland, this 5th day of Jan A. D., 1955.

Johnny Kilbane, Clerk.
By R. C. Korom, Deputy Clerk.

NOTICE REASSIGNING PROCEEDING

December 6, 1955.

Docket Section
Mrs. Hardwick
Miss A. Harris 52987
Miss Johnson
Statistical Section
File Section

The following proceeding is hereby reassigned from Judge Withey (Division 4) to Judge Murdock (Division 3):

52987 Morris W. Zack and Sarah Zack

Please change all records accordingly.

(signed) J. E. Murdock
J. E. Murdock
Chief Judge

OPINION OF TAX COURT

[25 T. C. 676]

Morris W. Zack and Sarah Zack, Petitioners, v. Commissioner of Internal Revenue, Respondent

Docket No. 52987. Filed December 30, 1955

Morris Garrett, Esq., and *Charles L. Levin, Esq.*, for the petitioner. *Peter K. Nevitt, Esq.*, for the respondent.

The Commissioner determined a deficiency of $26,036.68 in the income tax of the petitioners for 1950. The issues for decision are (1) whether the petitioners are taxable on one-third or only two-fifteenths of the income realized in 1950 from the sale of certain bomb hoists, and (2) whether that income was taxable as ordinary income from the conduct of a trade or business or as capital gain.

Findings of Fact

The petitioners, husband and wife, filed a joint Federal income tax return for 1950 with the collector of internal revenue for the district of Michigan. Morris W. Zack is sometimes hereinafter referred to as Zack.

Sam Breakstone of Cleveland, Ohio, and H. J. Johnson Company entered into an agreement on March 20, 1948, by which the latter agreed to sell to Breakstone 1,565 electric bomb hoists at $15 each, f. o. b. Columbus, Ohio. The bomb hoists had been manufactured for use by the Armed Forces and after the conclusion of World War II had been declared to be surplus. Breakstone made a downpayment of $1,000 at the time of entering into the agreement and was required to make additional payments of $1,000 each at intervals exteading over a period to end about July 1948. Breakstone was to receive shipments of additional hoists as he met later payments. Breakstone had paid $5,000 on the contract by April 30, 1948.

Breakstone had been conducting a store in Cleveland in which he sold mostly ball bearings and roller bearings and some other mechanical items. He displayed some of the bomb hoists in his store but never had any calls for the sale of any of them. He also had printed and distributed brochures illustrating and describing the hoists and bearing his name as "Factory Distributor," and his address and telephone number.

Breakstone began to have financial difficulties shortly after he entered into the agreement of March 20, 1948, and was unable to complete the payments for the bomb hoists. He offered on April 12, 1948, to sell an interest in the hoists to J. H. Tyroler of Cleveland, Ohio, who was connected with Tyroler Metals, Inc. Tyroler called his friend Zack, who was president of M. W. Zack Metal Company in Detroit, and told him of Breakstone's purchase of the hoists, of his inability to complete the payments therefor and that Tyroler Metals, Inc., was not interested in purchasing the hoists but he would be willing to advance one-half of the money required to complete the payments if

Zack would advance the other half so that each of the three, Breakstone, Tyroler, and Zack, would be the owner of a one-third interest in the hoists. Zack replied that the M. W. Zack Metal Company would not take any interest in the hoists, but he, his two sons, and his son-in-law would take a one-third interest on the terms proposed by Tyroler. The two sons and the son-in-law agreed orally with Zack that each would take 20 per cent of a one-third interest and would pay 20 per cent of the amount required to be paid with respect to a one-third interest and Zack would take the remaining 40 per cent.

Breakstone and Tyroler came to Zack's office in Detroit on April 13, 1948. Zack informed Breakstone and Tyroler that his sons and son-in-law would participate with him in a one-third interest and Breakstone, Tyroler, and Zack signed an instrument reading in part as follows:

> This transaction is as a result of a purchase made by Mr. Sam Breakstone of 648 Huron Road, Cleveland 15, Ohio, from the H. J. Johnson Co., 38 E. Spring Street, Columbus 15, Ohio, for approximately one thousand five hundred sixty-five (1565) * * * electric hoists, * * * at the price of $15.00 each, F. O. B. cars or trucks, Columbus, Ohio.
>
> In consideration of Mr. Breakstone's purchase, he is to advance $3500.00, or not less than $2000.00 for this purchase. The balance is to be paid by Mr. J. H. Tyroler, 5305 Sweeney Avenue, Cleveland 4, Ohio, and Mr. M. W. Zack, 2130 Howard Street, Detroit 16, Michigan.
>
> It is agreed between Mr. Breakstone, Mr. Tyroler, and Mr. Zack, that all profits and losses are to be equally divided. It is also agreed that whoever has the opportunity to make the sale of the above-mentioned material, should contact the other two parties of this agreement and notify them of the proposition for the sale.
>
> It is also agreed that in the event the electric hoists have to be converted from D. C. to A. C., the cost for same will be paid by Mr. Tyroler and Mr. Zack.

> In case of a partial sales, it is agreed that the monies derived from said sale will apply against the advance made by Mr. Tyroler and Mr. Zack.
>
> In the event that the hoists have to be moved from Columbus, Ohio, to Cleveland, Ohio, or Detroit, Michigan, said hoists should be sent to Cleveland in the name of Mr. Tyroler, and to Detroit in the name of Mr. Zack.

Zack then gave Tyroler a check for $15,000 to be applied on the purchase price of the hoists. No part of this amount was furnished by Zack's sons or his son-in-law although each offered to pay his share. Each authorized Zack to approve the sales of the hoists without prior consultation with them and agreed that they would pay Zack on demand for the cost of their participations in a one-third interest in the hoists. Zack never made any demand upon them for payment. Zack thereafter approved sales of the hoists as occasions arose. However, he consulted with one of his sons on one occasion prior to approving the sale then involved.

Johnson Company on April 30, 1948, entered into an agreement with Breakstone, Tyroler, and Zack which was supplementary to the agreement of March 20, 1948. Johnson Company, under the new agreement, accepted $16,000 in addition to the $5,000 theretofore paid as payment in full for the hoists. The total number of hoists delivered to Breakstone, Tyroler, and Zack under the agreement was 1,499, resulting in a cost of approximately $14 per hoist.

Breakstone continued his efforts, as before, to sell the hoists. He displayed the bomb hoists in his store, and contacted prospective customers through letters and calls in person. He continued to distribute the brochures and otherwise attempted to sell the hoists until practically all of them had been sold.

Breakstone purchased the hoists for resale and Tyroler and Zack acquired interests in the hoists with a view to the immediate resale of the hoists. Zack never solicited any one to purchase the hoists but informed salesmen of the

M. W. Zack Metal Company in New York City about the hoists and requested them to telephone him if they ran into any purchasers for them. They were furnished with sales literature by Breakstone.

Four hoists were sold as samples to Gimbel Bros. at $65 each on June 18, 1948, and one was shipped to each of its stores in New York City, Philadelphia, Pittsburgh, and Milwaukee. $257.40 was received from the sale of the hoists. Gimbel Bros. made no further purchases of the hoists.

The other sales of the hoists were made as follows:

Date of Sale	Purchaser	Number Sold	Total Selling Price
Feb. 15, 1950	Taylor Machine Co. Cleveland, Ohio	4	$ 234
Sept. 8, 1950	McGrath and Company, St. Paul, Minn.	200	20,000
Sept. 11, 1950	Parkersburg Junk Co., Parkersburg, W. Va.	1,275	127,500
	Total	1,479	$147,734

The remaining 16 hoists were abandoned during 1950.

Breakstone procured Gimbel Bros., Taylor Machine Co., and Parkersburg Junk Co. as purchasers of the hoists sold to them and furnished the name of McGrath and Company to Tyroler as a prospective purchaser of hoists. The sale was made through Tyroler.

Breakstone sold his one-third interest in the hoists to Tyroler on September 11, 1950, and also his interest in the contract with Parkersburg Junk Co. for the sale of hoists to it.

Zack owned about 67 per cent of the stock of M. W. Zack Metal Company and was its president. His sons, Eugene M. and Samuel N. Zack, owned about 11 per cent and 9 per cent, respectively, of the corporation's stock and were

vice president and treasurer, respectively. The remainder of the stock was owned by Zack's wife and grandchildren. Zack's son-in-law, Carl Schram, was assistant secretary and assistant treasurer of the corporation.

Zack's two sons and his son-in-law each received $8,000 from Tyroler on October 17, 1950, with the explanation that the amount "is your profit on the hoists deal." Zack was reimbursed for the advance made by him for the cost of the hoists so that he, his two sons, and his son-in-law equally shared the cost of the Zack interest in the hoists.

The petitioners reported for 1950 a long-term capital gain of $7,797.48 on the sale of bomb hoists while their sons and son-in-law reported long-term capital gains of $4,000 each.

The Commissioner, in determining the deficiency, held that the transaction involving the bomb hoists was a joint venture between Breakstone, Tyroler, and Zack; the two sons and the son-in-law were not members of the joint venture; and one-third of the earnings of the venture was taxable to Zack as ordinary income from the conduct of a trade or business.

The two sons and the son-in-law of Zack each acquired a 20 per cent interest in a one-third interest in the 1,499 bomb hoists involved herein and continued to be the owners of such interests until the sale or abandonment of the hoists.

Zack and his associates held the bomb hoists for sale to customers in the ordinary course of their trade or business.

All facts stipulated are incorporated herein by this reference.

Opinion

Murdock, *Judge:* The Commissioner takes the position that the arrangement between Zack, his two sons, and his son-in-law, whereby they were to share in the one-third interest in the bomb hoists here involved on a 40-20-20-20 percentage basis, was a sham and, accordingly, he has taxed one-third of the profits from the sale of the hoists to the petitioners as ordinary income from a trade or business. Zack's sons and his son-in-law each acquired a 20 per cent interest in the bomb hoists in 1948 and continued to hold such interests until the sale or abandonment of the hoists. The agreement between Zack, his sons, and his son-in-law, as might be expected, lacked most of the formalization that such an agreement would have between parties who were not so closely related by family and business activity. But the evidence shows that they agreed to share the undertaking and they carried out that agreement, as the receipt of the cash distribution of their respective shares verifies. The Commissioner erred by including the sons' and son-in-law's shares of the profit from the sales of the bomb hoists in the income of the petitioners.

The Commissioner's further position is that the income derived from the sale of the bomb hoists constituted ordinary income, instead of long-term capital gains as reported by the petitioners. His position is that transactions involving the bomb hoists resulted in the sales of other than capital assets within the provisions of section 117 (a) (1), Internal Revenue Code of 1939, because they were property held by Zack and his associates primarily for sale to customers in the ordinary course of their trade or business.

The purchase and sale of the hoists was not a part of any other business regularly carried on by Zack, but it has long been recognized that a taxpayer may be engaged in several businesses. The question is whether Zack and his associates were selling the bomb hoists in the ordinary course of a business carried on by them. The only purpose in buying the bomb hoists was to resell them at a higher price. There was no "investment" such as might

be made in other types of property, but on the contrary there was a general public offering and sales in such a manner that the exclusion of the statute cannot be denied.

Anything which Zack or his associates did in promoting the sales of the bomb hoists must also be attributed to each of the others. Breakstone displayed the hoists, printed and distributed a quantity of brochures illustrating and describing the hoists, wrote letters to and personally contacted potential customers, and continued this until practically all the hoists were sold. Likewise, Zack had his salesmen, who had been furnished with the brochures, looking for customers, and Tyroler was active in working with Breakstone and negotiating sales. The activities amounted to the carrying on of a business of selling the bomb hoists and the sales were to customers in the ordinary course of that business. The sales were not of capital assets. Cf. *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philber Equipment Corporation*, 25 T. C. 88.

Reviewed by the Court.

Decision will be entered under Rule 50.

Withey, *J.*, dissenting: I must dissent from the majority opinion in this case for the reason that under the facts found there is not the continuity of sales necessary for the conduct of a business within the meaning of section 117 (a) (1) of the Internal Revenue Code of 1939. In support of its decision, the majority has cited *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philber Equipment Corporation*, 25 T. C. 88. These cases as a matter of fact by corollary are authority for the opposite conclusion. In *Nathan D. Goldberg*, *supra*, ninety separate sales transactions of houses were consummated in 1946. In the area where the sales were made there was a heavy demand for houses; there was a ready market. In *Louis Greenspon*, *supra*, 138 sales transactions involving metal piping were carried on during the 2 years at issue. Sales were made to customers who were the ultimate users

of such pipe and who comprised the customer list of a corporation with whom petitioner had been identified. In *Philber Equipment Corporation, supra*, petitioner, through a used car dealer, during the fiscal year there involved sold 40 motor vehicles. The existence of customers constituting a ready market for used cars should be judicially noticed. In the case at bar, but four sales transactions took place between June 18, 1948, and September 11, 1950. There was no market for the bomb hoists involved. They were designed and useful only for the specialized purpose of hoisting bombs into the bomb bays of military aircraft. Petitioner individually made no sales of the hoists, secured no customers for them, employed no sales force, maintained no inventory of the hoists, nor any independent business office in connection with their sale. In fact, a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind. See *Thomas E. Wood*, 16 T. C. 213; *George R. Kemon*, 16 T. C. 1026; *Stern Brothers & Co.*, 16 T. C. 295.

DECISION

The parties filed an agreed computation on February 21, 1956, pursuant to the Court's Findings of Fact and Opinion filed December 30, 1955. Therefore, it is

Ordered and decided, that there is a deficiency in income tax in the amount of $6,834.36 for the taxable year 1950.

(Signed) J. E. Murdock,
Judge.

Enter: Entered February 24, 1956.

MOTION FOR REHEARING

THE TAX COURT OF THE UNITED STATES

Received 9:23 A.M. April 6, 1956
Lodged April 6, 1956
Filed April 9, 1956

THE TAX COURT OF THE UNITED STATES

Denied April 9, 1956
(Signed) J. E. Murdock,
Judge.

Now come your petitioners, Morris W. Zack and Sarah Zack, by their undersigned counsel, and move the Court for a re-hearing with respect to its decision herein, and on the determinations regarding the "capital gains issue" set forth in the Opinion of the Court filed December 30, 1955, based upon the following:

Tyroler Affidavit

There is attached hereto the affidavit of Joseph H. Tyroler. Tyroler, the petitioner Morris W. Zack, and one Samuel Breakstone, each owned an undivided one-third interest in certain bomb hoists.

One of the questions in this proceeding was whether the bomb hoists were capital asset . The Court determined they were not, and it is on its determination of that question that petifioners move for a re-hearing.

The statements in Tyroler's affidavit corroborate Zack's testimony concerning several critical matters, and contradict portions of Breakstone's testimony which were adopted by a majority of the Court in rendering its decision against the petitioners.

Explanation for Tyroler's Non-Appearance at Hearing

Tyroler's affidavit states that he had promised the attorneys for the petitioners that he would be present at the Tax Court hearing in these proceedings in Detroit, Michigan, and would testify; that petitioners' attorneys had communicated with him after they learned the date the case

was scheduled to be tried; that at the time of the trial he was in Miami Beach, Florida, and did not feel he ought to return to Detroit; and that he refused to return to Detroit to testify at the hearing, even though Zack and his attorneys asked him to and expected that he would do so (Tyroler's affidavit (Ty. A.), par. 9).

In this connection the Court's attention is directed to the statement of one of the attorneys for the petitioners, appearing on page 58 of the transcript.

It is apparent that petitioners, through their attorneys, had every reason to expect Tyroler to testify at the hearing. His last minute failure to be there is not traceable to any negligence of the petitioners or their attorneys. They should not be penalized because of Tyroler's refusal to keep his promise that he would testify.

It is respectfully submitted that the Court should grant the motion for re-hearing if, in its judgment, the statements in Tyroler's affidavit with regard to the facts of the case would, if believed, have been sufficient to negative those portions of Breakstone's testimony adopted by the Court in its opinion, and would have persuaded the Court of the incorrectness of the Commissioner's determination that the bomb hoists were not capital assets. Otherwise, the petitioners may, through no fault of their own, be required to pay a tax not justly due.

* * * * *

It is respectfully submitted that a re-hearing should be granted on the question whether the bomb hoists were capital assets in the hands of Zack.

Respectfully submitted,

/s/ Morris Garvett
Morris Garvett,
Counsel for Petitioners;

/s/ Charles L. Levin
Charles L. Levin,
Counsel for Petitioners;

/s/ Daniel E. Levin
Daniel E. Levin,
Counsel for Petitioners,
1250 Penobscot Building,
Detroit 26, Michigan.

AFFIDAVIT

State of Florida,
County of Dade—ss.

Joseph H. Tyroler, being duly sworn, deposes and says:

1. I make this affidavit at the request of Levin, Levin, Garvett and Dill, the attorneys for Morris W. Zack and Sarah Zack in the above captioned proceeding, for use therein.

2. In April, 1948, Morris W. Zack, Sam Breakstone, and I each acquired an undivided one-third interest in and to a quantity of bomb hoists.

3. Sam Breakstone was not authorized by me and, insofar as I am aware, was not authorized by Morris W. Zack to engage in any sales solicitation, or any other activity in connection with the disposition of the bomb hoists, and he had no authority to represent me, and, insofar as I am aware, he had no authority to represent Mr. Zack in connection therewith.

4. The sale of the four bomb hoists as samples to Ginnbel Brothers was Sam Breakstone's idea. That was the only sale of bomb hoists which was procured through his efforts.

5. The sale of bomb hoists to Taylor Machine Company came about as a result of Mr. Taylor's unsolicited visit to me during the course of which he said he had heard that I owned an interest in some bomb hoists. I worked out a transaction with him without any assistance from Mr. Breakstone.

6. The sale to McGrath & Company resulted from an inquiry from Mr. Taylor as to whether we would be willing to sell some bomb hoists to McGrath. I said that we would, and either Mr. Taylor or I, I do not recall which, negotiated the transaction with McGrath & Company. Mr. Breakstone had nothing to do with this transaction. I was advised that McGrath & Company purchased the bomb hoists because

they had made arrangements to dispose of them to the United States Government after some rewiring work had been done on them by McGrath & Company.

7. The sale to Parkersburg Junk Company was initiated when representatives of that company came in to see me without prior solicitation and told me that they had heard that I owned an interest in the bomb hoists and inquired whether I could sell the bomb hoists to them. I understood from them that they had a contract or inquiry from the United States Government and that they expected to dispose of the bomb hoists to the Government after purchase from us. I negotiated the transaction with them without any assistance from Mr. Breakstone.

8. Mr. Breakstone did not in any sense initiate either the sale to McGrath & Company, Taylor Machine Company or Parkersburg Junk Company, and the sales were initiated in the manner aforedescribed.

9. In the winter of 1954-1955, I made a trip from Cleveland, Ohio, to Detroit, Michigan, and discussed the facts of the matter with Levin, Levin, Garvett and Dill, the attorneys for Mr. Zack. While I was there I assured them that I would be present at the Tax Court hearing in Detroit, Michigan, and would testify. Said firm of attorneys communicated with me after they learned the date the case was scheduled to be tried. While the Tax Court was sitting in Detroit, I was in Miami Beach, Florida, at the Sea Isle Hotel. I was there on the advice of my physician, and did not feel that I ought to return to Detroit. Accordingly, I refused to return to Detroit to testify at the hearing even though both Mr. Zack and his attorneys asked me to and expected that I would do so.

/s/ Joseph H. Tyroler
Joseph H. Tyroler

Subscribed and sworn to before me this 20th day of February, 1956.

/s/ A. Harold Binder,
Notary Public, Dade County, Florida.

Notary Public, State of Florida at large.
My Commission expires Sept. 1, 1959.
Bonded by American Surety Co. of N. Y.

(Seal)

PETITION FOR REVIEW

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Morris W. Zack and Sarah Zack, Petitioners on Review, v. Commissioner of Internal Revenue, Respondent on Review.	Tax Court Docket No. 52987

Now comes Morris W. Zack and Sarah Zack, Petitioners on Review in the above entitled cause, by their attorneys, Morris Garvett and Charles E. Levin, and hereby petition the United States Court of Appeals for the Sixth Circuit to review the order and decision entered by The Tax Court of the United States, on February 24, 1956, ordering and deciding that there is a deficiency in Income Tax for the calendar year 1950, the taxable period here involved, in the amount of $6,834.36 in respect of the income tax liability of Morris W. Zack and Sarah Zack, the above named Petitioners on Review, insofar as said order and decision is based upon the Court's determination that the income realized by Morris W. Zack from the sale of his interest in certain bomb hoists was ordinary income rather than gain from the sale of capital assets held by him for more than six months.

Petitioners do not seek a review of said order and decision insofar as it is based upon the determinations by the Court that Morris W. Zack owned only 40% of an undivided one-third interest in said assets, and that the remaining 60% of said one-third interest was owned in equal shares by his two sons and his son-in-law, and that their said shares of the income realized upon the disposition of said assets was not realized by Morris W. Zack but by them.

Petitioners are individuals having their residence in the City of Detroit, State of Michigan. The return for the calendar year 1950, the period here involved, was filed with

the Collector of Internal Revenue for the District of Michigan, whose office is located at Detroit, Michigan, and which office is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

/s/ Morris Garvett,
Morris Garvett
/s/ Charles L. Levin,
Charles L. Levin
Attorneys for Petitioners on Review,
1250 Penobscot Building,
Detroit 26, Michigan.

Dated: May 10, 1956.

Office - Supreme Court, U.S.
FILED
JUN 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 195 7

No. ~~1117~~ 217

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES L. LEVIN,
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1250 Penobscot Building,
Detroit 26, Michigan.

Of Counsel:
MORRIS GARVETT,
1250 Penobscot Building,
Detroit 26, Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM 195....

No. .....

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Morris W. Zack and Sarah Zack pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The Opinion of the Tax Court is reported at 25 T. C. 676, and a copy of its Opinion, one judge dissenting, is printed in Appendix B hereto, *infra*, pages 7a-15a. The Court of Appeals did not file an Opinion in this case, and a copy of its order, one judge dissenting, is printed in Appendix B hereto, *infra*, page 5a. The Court of Appeals' Order has not been officially reported.

JURISDICTION

The Order of the Court of Appeals affirming the decision of the Tax Court was filed on February 19, 1957. The Petitioners filed a Petition for Rehearing with the Court of Appeals within the twenty day period permitted for filing same provided under Rule 22 of the Rules of the United State Court of Appeals for the Sixth Circuit. The Petition for Rehearing was denied by Order entered on March 26, 1957, and a copy of the Order is printed in Appendix B hereto, *infra*, page 6a. The jurisdiction of this Court is invoked under Sec. 7482 of the Internal Revenue Code of 1954 and Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Four separate questions are presented for review:

I.

Scope of judicial review

Does the clearly erroneous rule prevent judicial review, as a question of law, of the trial court's determination of whether property is a capital asset?

II.

Application of clear error rule

Is the function of the Court of Appeals discharged when it finds that there is substantial evidence to support the trial court's findings, in a case where the judges who made the findings did not have the opportunity either to see or hear the witnesses?

III.

Imputation of activity of co-owner of property to another co-owner

May the activities of an owner of an undivided interest in property be imputed to the owner of another undivided interest thereof, in the determination of the question of whether property was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business?

IV.

Capital asset definition

Were bomb hoists (designed for raising and lowering bombs to and from military aircraft) for which there was no market or customer at the time of purchase, and which were purchased by the Petitioners as a speculation, and sold at a price over seven times their cost more than two years later, after a demand therefor had arisen following the outbreak of hostilities in Korea, capital assets; the Petitioners neither having hired any salesmen, nor solicited any customer at any time, nor advertised the bomb hoists and the whole transaction being unique in the life of the Petitioners?

STATUTES INVOLVED

The pertinent statutory provisions are Section 117 of the Internal Revenue Code of 1939, page 50 of Vol. 53 part 1, U. S. Statutes at Large, and Section 7482 of the Internal Revenue Code of 1954, page 890 of Vol. 68A U. S. Statutes at Large. The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1a-3a.

STATEMENT

(The references in parentheses are to pages of appellant's printed appendix filed with the Court of Appeals, unless otherwise indicated. Nine copies of the printed appendix have been furnished to the Clerk of this Court.)

The basis of the jurisdiction of the court of first instance, The Tax Court of the United States, was a petition filed by the Petitioners pursuant to Section 272 of the Internal Revenue Code of 1939, for a redetermination of deficiencies asserted by the Commissioner of Internal Revnue for the calendar year 1950.

The case with respect to the questions is as follows:

In March, 1948, one Sam Breakstone, of Cleveland, Ohio, entered into an agreement for the purchase of approximately 1565 bomb hoists. He made an initial payment of $1,000, and agreed to make additional payments at varying intervals and to complete payment within 90 days (3a, 10a).

A bomb hoist is a device for the lifting of a bomb into a military bombing plane (26a, 27a). It is an intricate electrical mechanism (10a). The bomb hoists had been manufactured for use by the armed forces, and were declared surplus at the conclusion of World War II (4a).

Breakstone soon discovered that he would not be able to pay for the bomb hoists within the time limited by his contract. He thereupon communicated with one Joseph

Tyroler of Cleveland, Ohio, and attempted to interest him in the purchase of the bomb hoists (46a). Tyroler telephoned the Petitioner, Morris W. Zack (hereafter the "Petitioner"), in Detroit, Michigan, and told him about Breakstone's deal; that Breakstone did not have the money to complete his purchase and that while the bomb hoists cost $330 each to build, they could be purchased for $15 each (26a).

The following day, April 13, 1948, Breakstone and Tyroler came to Detroit to meet the Petitioner, and a written instrument was signed by the three of them under which Tyroler and the Petitioner agreed to pay the balance of the purchase price for the bomb hoists, and it was agreed that the profits would be shared equally[1] (12a, 26a).

Tyroler thereupon consummated the purchase (13a, 28a). 1499 bomb hoists were actually received (5a), of which 1483 were eventually sold and 16 were abandoned (7a).

Petitioner is the president of a corporation which deals in nonferrous metals such as copper, brass, aluminum, and zinc, as raw materials, which can readily be resold because of an ever-present market for such materials (25a, 30a, 40a). It does not buy or sell finished products (30a, 31a). None of the customers of the petitioner's corporation were potential purchasers of the bomb hoists, as the bomb hoist is an intricate manufactured product. No bomb hoists were at any time offered or sold to any of them, or to any purchaser obtained by Petitioner (Tax Court findings, *infra*, page 11a).

---

[1] It was also agreed that Petitioner's interest would be shared by the Petitioner's two sons and son-in-law. One of the Commissioner's contentions was that the share of the gain from the sale of the bomb hoists reported as the income of his two sons and son-in-law was the income of the Petitioner. The Tax Court rejected this contention, and the Commissioner withdrew an appeal therefrom.

Shortly after Tyroler and the Petitioner acquired an interest in the bomb hoists, 4 were sold on June 18, 1948, by Breakstone to Gimbel Brothers as a sample (5a, 56a). No further sale of bomb hoists was made until 19 months later when, on February 15, 1950, one of the original manufacturers of some of the bomb hoists—who knew where they were located (56a)—purchased 4 of them and took an option for 200 more (5a, 32a). It did not exercise its option (17a).

Hostilities in Korea broke out on June 25, 1950. Over six months after the sale of 4 bomb hoists under the option that was not exercised, 200 bomb hoists were sold to one purchaser through Tyroler, on September 8, 1950 (6a, 17a). Three days later, 1275 bomb hoists were sold to one purchaser (6a, 18a).

The Tax Court found that the Petitioner never solicited anyone to buy a bomb hoist (page 11a, *infra*). The dissenting judge who alone among the Tax Court judges, heard and saw the witnesses, observed: "* * * a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind." He also found "There was no market for the bomb hoists involved. They were designed and useful only for the specific purpose of hoisting bombs into the bomb bay of military aircraft" (page 15 *infra*).

The Court of Appeals, one judge dissenting, affirmed without filing a formal opinion. The order stated that "* * * it appearing that the findings of fact, *opinion* and *decision* of the Tax Court were not clearly erroneous", that its decision was "* * * affirmed, in accordance with the findings of fact and opinion of the Tax Court," (page 5a *infra*) (Italics added).

The dissenting judge dissented "* * * for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court."

REASONS FOR GRANTING THE WRIT

The reasons why, in the opinion of Petitioners, a Writ of Certiorari should be granted are discussed separately under the headings of the questions.

I.

DOES THE CLEARLY ERRONEOUS RULE PREVENT JUDICIAL REVIEW, AS A QUESTION OF LAW, OF THE TRIAL COURT'S DETERMINATION OF WHETHER PROPERTY IS A CAPITAL ASSET?

The Sixth Circuit has, in a series of recent opinions, held that the question of whether property is a capital asset, is one of fact, and that its powers of review are restricted by the "clear error" rule. (Citations hereinbelow).

The Sixth Circuit's first such rulings were expressly rested on prior holdings to like effect by the Courts of Appeal of the Ninth and Tenth Circuits. These rulings of the Sixth, Ninth and Tenth Circuits are in direct conflict with rulings of the Courts of Appeal for the Third, Fifth and Seventh Circuits which hold that the question is one of "ultimate fact", subject to review free from the restraining impact of the "clear error" rule.

Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless "clearly erroneous", and that rule is applicable to the findings of fact of the Tax Court (Section 7482 (a) of the Internal Revenue Code of 1954). The power of the Court of Appeals to review questions of law is not, however, so restricted. Section 7482 (c)(1) provides that the Court of Appeals may modify or reverse the decision of the Tax Court if it "is not in accordance with law."

It is, of course, of primary importance that the Courts of Appeal of the several circuits apply the same standard when approaching the same question. It is just as important that the appellate courts fully exercise their powers of review as it is that they do not exceed the powers granted to them. To review is, of course, the very function of the Courts of Appeal. It is respectfully submitted that the Sixth, Ninth and Tenth Circuits have taken an unduly restricted view of their powers of review, resulting in a failure properly to consider the questions of law inherent in the capital gain and loss cases.

The great diversity in the decisions of the several circuits in capital gain and loss cases is, no doubt, in part attributable to the expressed difference as to the degree of restraint that the Courts of Appeal should exercise in reviewing these cases. A ruling by the Supreme Court as to the correct standard of review would, no doubt, aid in bringing about uniformity of decision. All of the decisions cited below of the Courts of Appeal on this matter were decided within the last five years. It is respectfully submitted that the matter is now ripe for review.

The following is a brief summary of the statements in capital asset cases of the Courts of Appeal of the Sixth, Ninth and Tenth Circuits on the question, following which we will present a brief summary of the statements in capital asset cases of the Courts of Appeal of the Third, Fifth and Seventh Circuits with regard thereto.

Sixth Circuit

Dougherty v. Commissioner, 6th Cir., 216 F. 2d 110 (1954) "* * * essentially a question of fact. * * *"

Harry Slatkin Builders Inc. v. Commissioner, 6th Cir., 235 F. 2d 189 (1956) "* * * a question of fact * * *" Certiorari denied 352 U. S. 928.

Shepherd v. United States, 6th Cir., 231 F. 2d 445 (1956) "* * * this question is primarily a question of fact * * *".

United States v. C. R. Boudarant, 6th Cir., ... F. 2d .... (decided May 24, 1957, 1957 Commerce Clearing House Federal Tax Reports, Paragraph 9689) — "Whether they are actually capital assets, be they cotton, lard, oats or any other commodity, is a question of fact, depending upon all the facts in the case, including intention and good faith."

Ninth Circuit

Stockton Harbor Industrial Company v. Commissioner, 9th Cir., 216 F. 2d 638 (1954) — "What is and what is not trade or business and when property is or is not held for sale to customers are questions of fact." (at page 650) Accord: *United States v. O'Neill*, 9th Cir., 211 F. 2d 701 (1954); *Cohn v. Commissioner*, 9th Cir., 226 F. 2d 22 (1955).

Weyl-Zuckerman & Company v. Commissioner, 9th Cir., 232 F. 2d 214 (1956) — While this was not a capital asset case, the holding of the Court of Appeals in this tax case is of significance since it is directly opposed to that of the holdings of the Third Circuit in *Philber Equipment Corporation v. Commissioner, infra*, and of the Fifth Circuit in *Gamble v. Commissioner, infra*. The Ninth Circuit in this case held, "We are of the opinion that the so-called inferences drawn from other facts were still findings of fact within the meaning of Rule 52 (a), 28 U. S. C. A., as extended to cases from the Tax Court." (at p. 216)

Tenth Circuit

Friend v. Commissioner, 10th Cir., 198 F. 2d 285 (1952) — "It is the well-settled rule that whether property sold or otherwise disposed of by a taxpayer was held by him for sale to customers in the ordinary course of his trade or business, within the meaning of Section 117, is essentially a question of fact." (at page 287) Accord: *Home Co., Inc., v. Commissioner*, 10th Cir., 212 F. 2d 637 (1954); *Di Lisio v. Vidal*, 10th Cir., 233 F. 2d 909 (1956).

The holdings of the Third, Fifth and Seventh Circuits to the contrary follow:

Third Circuit

Curtis Company v. Commissioner, 3rd Cir., 232 F. 2d 167 (1956) — "This sounds like a fact conclusion. But is it subject to reversal if the conclusion is either clearly erroneous or if the findings of fact are induced by an erroneous view of the law," (at page 168).

Philber Equipment Corporation v. Commissioner, 3rd Cir., 237 F. 2d 129 (1956) — "With respect to that finding it must be noted that it was in the nature of an ultimate finding of fact and since such finding is but a legal inference from other facts it is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court, as we recently held in *Curtis Co. v. Commissioner*, 3rd Cir., (1956), 232 F. 2d 167" (at page 131).

Fifth Circuit

Galena Oaks Corporation v. Scofield, 5th Cir., 218 F. 2d 217 (1954) — "Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous rule"' " (citation omitted) (at page 219).

In *Goldberg v. Commissioner*, 5th. Cir., 223 F. 2d 709 (1955) and *Consolidated Naval Stores Company v. Fahs*, 5th Cir., 227 F. 2d 923 (1955), the court expressly reaffirmed its holding in *Galena Oaks Corporation v. Scofield*, *supra*, by quoting the language hereinabove quoted therefrom. Similarly: *Gamble v. Commissioner*, 5th Cir., 242 F. 2d 586 (1957).

Smith v. Commissioner, 232 F. 2d 142 (at page 143) (1956) — The Court indicated its disapproval of the practice of the Tax Court of denominating as a finding of fact its holdings on the "ultimate issue of the case", and again expressly adhered to the views stated in its previous decisions cited.

Seventh Circuit

Chandler v. United States, 7th Cir., 226 F. 2d 403 (1955) — "Though the District Judge made findings of fact, conclusions of law and filed a memorandum, Rule 52, Fed. Rules Civil Proc., 28 U. S. C. A., we are empowered to overturn his decision since the ultimate finding on which the judgment appealed rests is a conclusion of law, or a mixed one" (at page 405). Accord: *Farell v. Jarecki*, 7th Cir., 231 F. 2d 281 (1956).

—o—

Not only is there a clear and unmistakable conflict among the circuits on this important question, but the holdings of the Sixth, Ninth and Tenth Circuits are opposed to this Court's holding in *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481 (1937). In that case the question involved was the applicability of certain non-recognition of gain and loss provisions of the Internal Revenue Code. The Court observed:

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board. [Citation omitted]" (at page 491).

In *Baumgartner v. United States*, 322 U. S. 665 (1944), this Court ruled:

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court" (at page 671).

That this Court regards the correct interpretation of the capital asset definition as involving more than a consideration of whether the findings of fact of the Tax Court or of the District Court were clearly erroneous, is evidenced by the character of the Court's opinion in the capital asset case of *Corn Products Refining Company v. Commissioner*,

350 U. S. 46 (1956), and by the fact that on June 3, 1957 the Court granted the Commissioner certiorari (Docket 921) to the Court of Appeals for the Fifth Circuit in the capital asset case of *Commissioner v. P. G. Lake, Inc.*, 5th Cir., 241 F. 2d 71 (1957).

The Sixth, Ninth and Tenth Circuits' approach to the judicial function in capital asset cases is manifestly different from that of the Third, Fifth and Seventh Circuits. This in and of itself raises an important question which requires resolution by this Court. Review is also justified by the apparent conflict with decisions of this Court in the cited decisions of the Sixth, Ninth and Tenth Circuits on this issue.

II.

IS THE FUNCTION OF THE COURT OF APPEALS DISCHARGED WHEN IT FINDS THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS, IN A CASE WHERE THE JUDGES WHO MADE THE FINDINGS DID NOT HAVE THE OPPORTUNITY EITHER TO SEE OR HEAR THE WITNESSES?

Not only has the Sixth Circuit unduly restricted the scope of judicial review by holding that the question of what is a capital asset is one of fact, but the Court has expressed itself in a way which indicates that it is probably applying an unwarranted standard in determining what is clearly erroneous.

In 1948, Congress amended Section 1141 (a) of the Internal Revenue Code of 1939 to provide that the Courts of Appeal would have jurisdiction to review the decisions of the Tax Court, "* * * in the same manner and to the same extent as decisions of the District Court in civil actions tried without a jury * * *" (Public Law 773, 80th Congress).

In *Miller v. Commissioner*, 6th Cir., 183 F. 2d 246 (1950) Judge McAllister, the judge who signed the order in this case, speaking for the Court, held:

> "Assuredly, this court on review does not weigh the evidence, or pass upon the credibility of the witnesses. Those are the functions of the trier of the facts, and for it alone. It is only when there is no substantial evidence to support the findings and decision, or on errors of law, that a reviewing court may act to set aside a decision of the Tax Court" (at page 252).

We respectfully submit that Judge McAllister's statement is erroneous, and that the same erroneous standard was applied in the consideration of this case. The error of his statement is perhaps best demonstrated by the decision of this Court in *United States v. United States Gypsum Company*, 333 U. S. 364 (1948), where the Court held:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (at page 395).

It is one thing to say that the finding must be affirmed if there is substantial evidence to support it (as was held in the cited 6th Circuit case), and quite another to say that even if there is evidence to support it the reviewing court may still reverse, if after reviewing the entire evidence it "is left with the definite and firm conviction that a mistake has been committed."

The statement by this Court is particularly apposite in a case such as the one at bar where the judges who signed the Tax Court's findings of fact did not see or hear the witnesses, and relied solely on the printed record, and where the one judge who possessed the advantage of hearing and observing the witnesses and who had the first-hand opportunity to form an opinion as to their credibility based upon their demeanor, responsiveness and like intangibles, dissented from the findings of fact of the Tax Court and would have held for the Petitioners (2a, page 15a, *infra*).

Rule 52 (a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Second Circuit has ruled that a less strict rule of review is applicable where the trial court did not have the advantage of hearing and observing the witnesses. In *Orvis v. Higgins*, 2nd Cir., 180 F. 2d 537 (1950), the Court held:

> "Where the evidence is partly oral, and the balance is written or deals with undisputed facts, then we ignore the trial judge's finding and substitute our own * * * if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance" (at page 539).

Similarly, *Galena Oaks Corporation v. Scofield*, 5th Cir., *supra*:

> "The burden is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous rule' is still applicable" (at page 219).

In this case the findings of the Tax Court were based solely on the written record.

The approach of the Sixth Circuit is contrary to the holdings of the Courts of Appeal for the Second and Fifth Circuits, that where the trial judge's findings are based upon "written evidence", the appellate court may ignore the trial judge's findings and substitute its own *(Orris)*, or that the burden of overcoming them is "lighter, much lighter" *(Galena Oaks)*.

The situation here is similar to that which caused this Court to observe, in *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474 (1951):

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function" (at p. 490).

It is respectfully submitted that the failure of the Sixth Circuit to apply a correct rule of review in this case, and presumably other cases as well, raises an important question with respect to which this Court might appropriately grant certiorari.

III.

MAY THE ACTIVITIES OF AN OWNER OF AN UNDIVIDED INTEREST IN PROPERTY BE IMPUTED TO THE OWNER OF ANOTHER UNDIVIDED INTEREST THEREOF, IN THE DETERMINATION OF THE QUESTION OF WHETHER PROPERTY WAS HELD BY THE TAXPAYER PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF HIS TRADE OR BUSINESS?

The Tax Court in its Opinion held:

> "Anything which Zack or his associates did in promoting the sales of the bomb hoists must also be attributed to each of the others."

This was not a finding of fact. Actually the facts are opposed to it. It was, rather, a statement of an abstract

proposition of law. The Tax Court, however, cited no authority, nor did the Court of Appeals in its order of affirmance.

Despite the form of the Tax Court's statement, the purpose of it was not to attribute to the other co-owners of the bomb hoists the activities of Petitioner, but rather to attribute to Petitioner the activities of Breakstone. The meaning of the Tax Court's ruling was that Breakstone's activities—meager and ineffectual as they were—were to be attributed to Petitioner. The consequence thereof was that while Petitioner clearly was not himself engaged in a trade or business, he was held to be because of the activities of Breakstone which he did not authorize, and of which he was unaware.

In the following cases, the Courts of Appeal of seven circuits held an asset to be a capital asset even though the activities carried on by an agnet of the taxpayer in the sale of the property quite clearly amounted to engagement by the agent in a trade or business: *Reynolds v. Commissioner*, 1st Cir., 155 F. 2d 620 (1946), *Phipps v. Commissioner*, 2nd Cir., 54 F. 2d 469 (1931), *Philber Equipment Corporation v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956), *Camp v. Murray*, 4th Cir., 226 F. 2d 931 (1955), *Smith v. Dunn*, 5th Cir., 224 F. 2d 353 (1955), *Dillon v. Commissioner*, 8th Cir., 213 F. 2d 218 (1954) and *Fidler v. Commissioner*, 9th Cir., 231 F. 2d 138 (1956).

In *Ross v. Commissioner*, 5th Cir., 227 F. 2d 265, 267 (1955), concerning the sale of lots, the Court rejected the Commissioner's contention that the taxpayer's prior activities in real estate partnerships that functioned largely through other partners, were relevant. The Court characterized the Commissioner's contention as a "* * * postulate presumably that these raised a presumption against [the taxpayer] under some such theory as 'guilt

by association or contamination of his activities in the years in question and with respect to this particular property which had been acquired by the taxpayer from one of those partnerships by what he had been doing in former years; and the frequency and continuity of sales" (at page 260).

In *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947, 951 (1956), the taxpayers disposed of over $400,000.00 worth of pipe acquired by them as stockholders of a dissolved corporation. They filed a partnership return. The Court observed: "More than joint ownership of property and desire to liquidate the joint ownership are required to create a partnership" (at page 951).

Surely the fact that the parties labeled their original agreement a "joint venture" agreement is without significance. It is a familiar principle that a witness will not be permitted to testify as to a legal conclusion. The same principle requires that no significance be attached to the label that laymen put on their writings, particularly in a case where the undisputed facts completely negative any relationship of agency. *Smith v. Dunn*, 5th Cir., 224 F. 2d 353, 357 (1955).

The undisputed facts are that the Petitioner never authorized Breakstone to engage in any of his alleged activities, nor was he aware thereof (12a, 36a). Tyroler alone had physical possession of the bomb hoists and it would have been impossible for Breakstone to have delivered any of them on his own initiative (60a). There is nothing in the record to indicate that Breakstone ever communicated to Petitioner any of his alleged activities.

Whether or not the facts being undisputed and there being no finding of fact to the contrary—the Tax Court was correct in stating that the activities of Breakstone

"must also be attributed to each of the others" is clearly a question of law rather than of fact.

The Sixth Circuit's affirmance of the Tax Court's conclusion of law on this point is clearly contrary to the holdings of the other Courts of Appeal. It presents a question on which the Supreme Court might appropriately grant certiorari to resolve the apparent conflict.

IV.

WERE BOMB HOISTS (DESIGNED FOR RAISING AND LOWERING BOMBS TO AND FROM MILITARY AIRCRAFT) FOR WHICH THERE WAS NO MARKET OR CUSTOMER AT THE TIME OF PURCHASE, AND WHICH WERE PURCHASED BY THE PETITIONERS AS A SPECULATION, AND SOLD AT A PRICE OVER SEVEN TIMES THEIR COST MORE THAN TWO YEARS LATER, AFTER A DEMAND THEREFOR HAD ARISEN FOLLOWING THE OUTBREAK OF HOSTILITIES IN KOREA, CAPITAL ASSETS; THE PETITIONERS NEITHER HAVING HIRED ANY SALESMEN NOR SOLICITED ANY CUSTOMER AT ANY TIME, NOR ADVERTISED THE BOMB HOISTS AND THE WHOLE TRANSACTION BEING UNIQUE IN THE LIFE OF THE PETITIONERS?

The Tax Court's Opinion cited only three decisions. They were *Nathan D. Goldberg*, 22 T. C. 533, (1954); *Louis Greenspon*, 23 T. C. 138 (1954); and *Philber Equipment Corporation*, 25 T. C. 88 (1955). Each of these decisions was subsequently reversed on the capital gains issue by the United States Court of Appeal which reviewed them: *Goldberg v. Commissioner*, 5th Cir., 223 F. 2d 709 (1955), *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947 (1956), and *Philber Equipment Corporation v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956).

The Petitioner in his brief called the attention of the Court of Appeals to the fact that each of these cases had been reversed on appeal. In affirming "in accordance"

with the Tax Court's Opinion, the Sixth Circuit has identified itself with an interpretation of the law which is not acceptable to the Courts of Appeal for the Third, Fifth and Eighth Circuits. This conflict between the Circuits is one which, it is respectfully submitted, invites review by the Supreme Court in order to resolve the apparent diversity in approach to this important field of federal taxation.

In *Philber* (3rd Cir.) the taxpayer was in the business of leasing automobiles. At the conclusion of the rental period, it sold them through a sales partnership which was a large scale dealer in automobiles, and the interests in which were identical with the stock holdings in the taxpayer corporation. In the tax year in question 45 vehicles were sold. The Court of Appeals reversed the Tax Court and held the vehicles were capital assets.

In *Greenspon* (8th Cir.), the taxpayers were stockholders of a dissolved corporation which had been engaged in the sale of pipe. They disposed of over $400,000 worth of pipe received on the corporation's dissolution in 138 sales transactions in a two-year period. Many of the purchasers had previously done business with the dissolved corporation. Immediately after the sale of all of the pipe received in dissolution, one of the stockholders organized a corporation, and the husband of the other a second corporation, to engage in the business of selling pipe. The Court of Appeals reversed the Tax Court and held that the sales by the stockholders themselves were sales of capital assets.

In *Goldberg* (5th Cir.), ninety houses were sold by the taxpayer corporation in the year in question, and twenty-one had been sold in the previous three year period. One of the stockholders of the corporation (dissolved prior to suit, and the individual taxpayers being liable as transferees thereof) had "occasionally sold a parcel of real

estate", and the taxpayer's principal activity "* * * was managing property for others, but he occasionally sold properties for others on commission" (at p. 711). The Court of Appeals reversed the Tax Court and held the houses were capital assets.

Not only is the Sixth Circuit's decision opposed to decisions of the Courts of Appeal for the Third, Fifth and Eighth Circuits, but it is also opposed to recent holdings of the Courts of Appeal for the Fourth and Seventh Circuits as well.

In *Camp v. Murray*, 4th Cir., 226 F. 2d 931 (1955), acreage was subdivided, improvements made, and thirty sales were made in the year in question. The district court was reversed and it was held that the lands were capital assets.

In *Chandler v. United States*, 7th Cir., 226 F. 2d 403 (1955), in reversing the district court, the Court of Appeals held that trustees liquidating a long held investment in one million acres of land were entitled to capital gains treatment on the profits realized even though there were at least 536 separate sales transactions extending over an eight year period. The court observed:

> "Had the lands been sold in a single unit there probably would have been slight debate concerning their capital asset status. But the market place is hardly glutted with prospective buyers clamoring for million acre tracts. It seems odd to penalize this taxpayer because it actively sought to dispose of these holdings" (at p. 406).

Accord: *Fahs v. Crawford*, 5th Cir., 161 F. 2d 315 (1947). 95 lots improved by the taxpayer were sold in 1940 and 1941. The Court held the lots were capital assets, and observed:

> "Carrying on a business, however, implies an occupational undertaking to which one *habitually devotes time, attention, or effort with substantial regularity*" (at p. 317) (Italics added).

In *Dunlap v. Oldham Lumber Co.*, 5th Cir., 178 F. 2d 781 (1950), the Court observed:

> "* * * as to the 'business' referred to in the statute, "the word, notwithstanding disguise in spelling and pronounciation, means *business*; it implies that one is kept more or less busy, *that the activity is an occupation*. It need not be one's sole occupation, nor take all of his time.'" (Italics added.) (At p. 784.)

In *Smith v. Commissioner*, 5th Cir., 232 F. 2d 142 (1956), the Court in reversing the Tax Court, rejected the contention that because 117 houses had been sold in a two-year period that the sales were not sales of a capital asset with the statement that "* * * where there is much to sell, there must or may be many sales" (at p. 145).

In this case there was only one purchase, and only four sales over a period of over two years, a lapse of 19 months between the first and second sales, and of over six months between the second and third sales (7a). Over 99.44% of the hoists sold were sold in a three-day period (7a). It is undisputed that there was no activity on the part of the Petitioners with respect to either the purchase or the sales, other than to agree thereto (29a, 35a, 36a). No advertisements were placed or salesmen hired by anybody, or improvements to facilitate sales made (35a, 36a). In the words of the dissenting Tax Court judge: "* * * a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind" (at page 15a *infra*).

The decision of the Sixth Circuit in this case is clearly in conflict with those of the Third, Fourth, Fifth, Seventh, and

Eighth Circuits in cases certainly no stronger for the taxpayer than the Petitioner's.

The Tax Court placed great emphasis on the fact that the bomb hoists were purchased for resale and observed:

> "The only purpose in buying the bomb hoists was to resell them at a higher price. There was no 'investment' such as might be made in other types of property * * *."

Prior to the affirmance by the Sixth Circuit in this case, efforts to inject the notion that the purpose to resell at a profit might have a bearing on the matter had been rejected by the Courts of Appeal for the Second, Seventh and Ninth Circuits.

In *512 West Fifty-Sixth Street Corporation v. Commissioner*, 2nd Cir., 151 F. 2d 942 (1945), it was conceded that the property was "held primarily for sale" (at page 944).

In *Phipps v. Commissioner*, 2nd Cir., 54 F. 2d 469 (1931), the property was purchased "* * * with the expectation of selling it when a good price [was] offered * * *" (at page 471).

In *Beck v. Commissioner*, 7th Cir., 179 F. 2d 688 (1950), the Court observed that, "At most, they only endeavored to dispose of the lot at the best available price, and investigated the possibilities for improvement of the real estate" (at page 690).

In *Fidler v. Commissioner*, 9th Cir., 231 F. 2d 138, (1956), the Court of Appeals relied on the following quotation from the Tax Court's Opinion:

> He made an investment in the literary properties with the hope or expectation of selling them at a profit" (at p. 144).

The Tax Court in its Opinion, *James F. Fisher*, 20 T. C. 1081 (1953), observed that: "* * * He [the taxpayer] may have held them for sale, but not 'primarily for sale to customers in the ordinary course of his trade or business'" (at page 1094).

It is clear that the fact that the taxpayer holds the property for sale—even for sale at a profit—has no bearing on the question of whether he holds it "primarily for sale to customers in the ordinary course of his trade or business." This rule of law is entirely consistent with the Internal Revenue Regulations which provide:

> "In determining whether property is a 'capital asset', the period for which held is immaterial." *Internal Revenue Regulation 111*, Sec. 29.117-1.

The Sixth Circuit's affirmance of the Tax Court on this point is contrary to the regulation and the decisions of the Second, Seventh and Ninth Circuits.

* * * * *

The Tax Court's view that because the bomb hoists were not income-producing property, "there was no 'investment' such as might be made in other types of property"[2] is not relevant. In affirming the Tax Court on this point, the Sixth Circuit has again in a *per curiam* opinion affirmed a Tax Court Opinion making this erroneous statement. See *Dunitz v. Commissioner*, 6th Cir., 167 F. 2d 223 (1948)[2].

It is not difficult to bring to mind numerous examples of property which are not income-producing but nevertheless frequently constitute a capital asset in the hands of the holders thereof. In *Reynolds v. Commissioner*, 1st Cir.,

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[2] In HARRY DUNITZ, 7 T. C. 672, 684, the Tax Court held that "it is obvious that the bonds were neither purchased nor held as an investment" because they did not produce income.

155 F. 2d 620 1946) the First Circuit held that jewelry was a capital asset. In *Phipps v. Commissioner*, *supra*, the Second Circuit held that vacant land was a capital asset; as did the Fifth Circuit in *Fahs v. Crawford*, *supra*, and *Ross v. Commissioner*, *supra*. In *Greenspon*, *supra*, the Eighth Circuit held that pipe was a capital asset. In affirming the Tax Court on this point, in accordance with its opinion, the Sixth Circuit is in conflict with other Circuits.

* * * * * *

The dissenting Tax Court judge who heard and saw the witnesses found:

> "There was no market for the bomb hoists involved. They were designed and useful only for the specialized purpose of hoisting bombs into the bomb bays of military aircraft.".

The dissenting judge in the Court of Appeals dissented "for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court:"

The Tax Court majority made no findings of fact contrary to those of its dissenting judge. Nor could it properly have done so. The record is manifest that there was no market for bomb hoists; obviously if Breakstone had had customers for the bomb hoists, it would not have been necessary to share his deal with Tyroler and the Petitioner. The bomb hoists had been declared surplus, and the entire record establishes that before the outbreak of hostilities in Korea no one had any use for the bomb hoists.

If, in the spring or early summer of 1950, the owners had thought at all of their investment in the bomb hoists, they must have reflected on the folly that induced them to invest good money in such worthless articles. At that time they did not know whether they would even recover their

investment, let alone make a profit thereon. Their entire experience with the bomb hoists up to that point was opposed to any expectation that the transaction would prove profitable. At that time they did not know anyone who would buy a bomb hoist.

The legislative history of the capital asset provisions demonstrates, beyond peradventure of a doubt, that Congress intended that even if a taxpayer is engaged in business he shall nevertheless be entitled to or subjected to capital gain and capital loss treatment unless he holds the article for sale "to customers" in the "ordinary course" of such trade or business. *George R. Kemon*, 16 T. C. 1026, 1032 (1951); *Thomas E. Wood*, 16 T. C. 213, 219 (1951); *Frank B. Polacheck*, 22 T. C. 858, 862 (1954).

In determining whether or not a taxpayer is a dealer or a trader or speculator the merchant analogy has been employed. *George R. Kemon*, et al., 16 T. C. 1026, 1033 (1951). Merchants have customers and traders or speculators do not.

> "The element of resale *to customers*—i.e. people who regularly or repeatedly deal with them—necessitates both possession of the thing to be sold and customers to sell it to." (Emphasized by the Court.) *Schlafer v. Helvering*, Ct. App. C. C. 83 F. 2d 317 (at p. 319) (1936) aff'd 299 U. S. 171, 174 (1936).

In the recent case of *Farrell v. Jarecki*, 7th Cir., 231 F. 2d 281 (1956), certiorari denied 352 U. S. 830, the Court of Appeals held that the sales by the taxpayer of commodity futures, the taxpayer in one year having engaged in over 10,000 transactions, were nevertheless sales of capital assets because the sales were not to customers within the meaning of the capital asset definition. The Court observed:

> "Just as any other possessor of a capital asset, Farrell owned property there a claim or contract right) but these commodity futures were held by him primarily for price fluctuations—the buying and selling followed" (at p. 288).

So in the case at bar. The gain realized by the Petitioner was not due to his or anyone else's efforts, but rather to a sharp and unexpected rise in the value of the article itself, caused by the outbreak of war. It seems most incongruous to say that an article that cannot be sold, and for which there was no market, was nevertheless held for resale "to customers in the ordinary course of a trade or business." The Petitioner purchased the bomb hoists as a flyer because they cost $330.00 to build, and could be purchased for $17.00 apiece (26a, 38a). The speculative investment by the Petitioner in an article as unusual as are bomb hoists was a unique transaction in his life, and the gain realized by him was not due to any activity on his or anyone else's part.

* * * * *

The Sixth Circuit's decision is also contrary to this Court's holding in *Corn Products Refining Company, supra.* In that case this Court held:

> "The preferential treatment provided by §117 applies to transactions in property which are not the normal source of business income" (at p. 52).

Surely the gain realized by the Petitioner in a once-in-a-lifetime transaction on the sale of bomb hoists, due to a rise in the value of the article itself, it not "the normal source of business income."

It is respectfully submitted that the Sixth Circuit's decision is clearly opposed to the decisions of other Circuits on all the points that are involved in this case, as well as

to this Court's holding in *Corn Products Refining Company*, and that this diversity in approach by the Sixth Circuit to capital asset cases justifies this Court in granting certiorari to resolve the conflict.

On June 3, 1957, certiorari was granted the Commissioner (Docket 921) to review the decision in *Commissioner v. P. G. Lake, Inc.*, Fifth Cir., 241 F. 2d 71, presenting the question whether limited overriding oil payments carved out of leaseholds or working interests are capital assets. It is most respectfully submitted that the case at bar presents another aspect of the correct interpretation of the capital asset definition—one which could appropriately be considered together with *P. G. Lake, Inc.*

CONCLUSION

The Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

INTERNAL REVENUE CODE OF 1939

Sec. 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(2) Short-Term Capital Gain.—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;

(3) Short-Term Capital Loss.—The term "short-term capital loss," means loss from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such loss is taken into account in computing net income;

(No changes in substance were made in the reenactment of the foregoing in sections 1221 and 1222 of the Internal Revenue Code of 1954.)

* * * * *

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INTERNAL REVENUE CODE OF 1954

Sec. 7482. Courts of Review.

(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—

(1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * * *

—o—

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 52. Findings by the Court

(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

—o—

REVISED RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RULE 22

PETITION FOR REHEARING

(f) *Time.* A petition for rehearing may be filed within twenty days after judgment is entered, unless the court or a judge thereof grants further time upon a motion filed within such twenty days.

* * * * *

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APPENDIX B

No. 12,953

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Morris W. Zack and Sarah Zack,
Petitioners and Appellants,
v.
Commissioner of Internal Revenue,
Respondent and Appellee.

ORDER

(Filed March 19, 1957)

Before Allen, McAllister and Stewart, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and it appearing that the findings of fact, opinion and decision of the Tax Court were not clearly erroneous; and the court being duly advised,

Now therefore, it is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed, in accordance with the findings of fact and opinion of the Tax Court.

Judge Stewart dissents for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court. 25 T. C. 676, 681.

Approved for entry:

/s/ Thomas F. McAllister,
United States Circuit Judge.

No. 12,953

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Morris W. Zack and Sarah Zack,
Appellants,

v.

Commissioner of Internal Revenue,
Appellee.

ORDER

(Filed March 26, 1957)

Before Allen, McAllister and Stewart, Circuit Judges.

The petition for rehearing is denied.

Judge Stewart is of the opinion that the petition for rehearing should be granted.

Approved for entry:

/s/ Thomas F. McAllister,
United States Circuit Judge.

OPINION OF THE TAX COURT OF THE UNITED STATES

(25 T. C. 676)

Morris W. Zack and Sarah Zack, Petitioners v. Commissioner of Internal Revenue, Respondent.

Docket No. 52987.

(Filed December 30, 1955)

Morris Garvett, Esq., and Charles L. Levin, Esq., for the petitioner; Peter K. Nevitt, Esq., for the respondent.

The Commissioner determined a deficiency of $26,036.68 in the income tax of the petitioners for 1950. The issues for decision are (1) whether the petitioners are taxable on one-third or only two-fifteenths of the income realized in 1950 from the sale of certain bomb hoists, and (2) whether that income was taxable as ordinary income from the conduct of a trade or business or as capital gain.

Findings of Fact

The petitioners, husband and wife, filed a joint Federal income tax return for 1950 with the collector of internal revenue for the district of Michigan. Morris W. Zack is sometimes hereinafter referred to as Zack.

Sam Breakstone of Cleveland, Ohio, and H. J. Johnson Company entered into an agreement on March 20, 1948, by which the latter agreed to sell to Breakstone 1,565 electric bomb hoists at $15 each, f.o.b. Columbus, Ohio. The bomb hoists had been manufactured for use by the Armed Forces and after the conclusion of World War II had been declared to be surplus. Breakstone made a down-payment of $1,000 at the time of entering into the agree-

ment and was required to make additional payments of $1,000 each at intervals extending over a period to end about July 1948. Breakstone was to receive shipments of additional hoists as he met later payments. Breakstone had paid $5,000.00 on the contract by April 30, 1948.

Breakstone had been conducting a store in Cleveland in which he sold mostly ball bearings and roller bearings and some other mechanical items. He displayed some of the bomb hoists in his store but never had any calls for the sale of any of them. He also had printed and distributed brochures illustrating and describing the hoists and bearing his name as "Factory Distributor," and his address and telephone number.

Breakstone began to have financial difficulties shortly after he entered into the agreement of March 20, 1948, and was unable to complete the payments for the bomb hoists. He offered on April 12, 1948, to sell an interest in the hoists to J. H. Tyroler of Cleveland, Ohio, who was connected with Tyroler Metals, Inc. Tyroler called his friend Zack, who was president of M. W. Zack Metal Company in Detroit, and told him of Breakstone's purchase of the hoists, of his inability to complete the payments therefor and that Tyroler Metals, Inc., was not interested in purchasing the hoists but he would be willing to advance one half of the money required to complete the payments if Zack would advance the other half so that each of the three, Breakstone, Tyroler, and Zack, would be the owner of one-third interest in the hoists. Zack replied that the M. W. Zack Metal Company would not take any interest in the hoists, but he, his two sons, and his son-in-law would take a one-third interest on the terms proposed by Tyroler. The two sons and the son-in-law agreed orally with Zack that each would take 20% of a one-third interest and would pay 20 percent of the amount required to be paid with re-

spect to a one-third interest and Zack would take the remaining 40 per cent.

Breakstone and Tyroler came to Zack's office in Detroit on April 13, 1948. Zack informed Breakstone and Tyroler that his sons and son-in-law would participate with him in a one-third interest and Breakstone, Tyroler, and Zack signed an instrument reading in part as follows:

> This transaction is as a result of a purchase made by Mr. Sam Breakstone of 648 Huron Road, Cleveland 15, Ohio, from the H. J. Johnson Co., 38 E. Spring Street, Columbus 15, Ohio, for approximately one thousand five hundred sixty-five (1565) * * * electric hoists, * * * at the price of $15.00 each, F.O.B. cars or truck, Columbus, Ohio.
>
> In consideration of Mr. Breakstone's purchase, he is to advance $3500.00, or not less than $2000.00 for this purchase. The balance is to be paid by Mr. J. H. Tyroler, 5305 Sweeney Avenue, Cleveland 4, Ohio, and Mr. M. W. Zack, 2130 Howard Street, Detroit 16, Michigan.
>
> It is agreed between Mr. Breakstone, Mr. Tyroler, and Mr. Zack, that all profits and losses are to be equally divided. It is also agreed that whoever has the opportunity to make the sale of the above-mentioned material, should contact the other two parties of this agreement and notify them of the proposition for the sale.
>
> It is also agreed that in the event the electric hoists have to be converted from D.C. to A.C., the cost for same will be paid by Mr. Tyroler and Mr. Zack.
>
> In case of a partial sale, it is agreed that the monies derived from said sale will apply against the advance made by Mr. Tyroler and Mr. Zack.

> In the event that the hoists have to be moved from Columbus, Ohio, to Cleveland, Ohio, or Detroit, Michigan, said hoists should be sent to Cleveland in the name of Mr. Tyroler, and to Detroit in the name of Mr. Zack.

Zack then gave Tyroler a check for $15,000 to be applied on the purchase price of the hoists. No part of this amount was furnished by Zack's sons or his son-in-law although each offered to pay his share. Each authorized Zack to approve the sales of the hoists without prior consultation with them and agreed that they would pay Zack on demand for the cost of their participations in a one-third interest in the hoists. Zack never made any demand upon them for payment. Zack thereafter approved sales of the hoists as occasions arose. However, he consulted with one of his sons on one occasion prior to approving the sale then involved.

Johnson Company on April 30, 1948, entered into an agreement with Breakstone, Tyroler, and Zack which was supplementary to the agreement of March 20, 1948. Johnson Company, under the new agreement, accepted $16,000 in addition to the $5,000 theretofore paid as payment in full for the hoists. The total number of hoists delivered to Breakstone, Tyroler, and Zack under the agreement was 1,499, resulting in a cost of approximately $14 per hoist.

Breakstone continued his efforts, as before, to sell the hoists. He displayed the bomb hoists in his store, and contacted prospective customers through letters and calls in person. He continued to distribute the brochures and otherwise attempted to sell the hoists until practically all of them had been sold.

Breakstone purchased the hoists for resale and Tyroler and Zack acquired interests in the hoists with a view to the

immediate resale of the hoists. Zack never solicited any one to purchase the hoists but informed salesmen of the M. W. Zack Metal Company in New York City about the hoists and requested them to telephone him if they ran into any purchasers for them. They were furnished with sales literature by Breakstone.

Four hoists were sold as samples to Gimbel Bros. at $65 each on June 18, 1948, and one was shipped to each of its stores in New York City, Philadelphia, Pittsburgh, and Milwaukee. $257.40 was received from the sale of the hoists. Gimbel Bros. made no further purchases of the hoists.

The other sales of the hoists were made as follows:

Date of Sale	Purchaser	No. Sold	Total Selling Price
Feb. 15, 1950	Taylor Machine Co., Cleveland, Ohio.	4	$ 234
Sept. 8, 1950	McGrath & Company, St. Paul, Minn.	200	20,000
Sept. 11, 1950	Parkersburg Junk Co. Parkersburg, W. Va.	1,275	127,500
Total		1,479	$147,734

The remaining 16 hoists were abandoned during 1950.

Breakstone procured Gimbel Bros., Taylor Machine Co., and Parkersburg Junk Co. as purchasers of the hoists sold to them and furnished the name of McGrath and Company to Tyroler as a prospective purchaser of hoists. The sale was made through Tyroler.

Breakstone sold his one-third interest in the hoists to Tyroler on September 11, 1950, and also his interest in the contract with Parkersburg Junk Co. for the sale of hoists to it.

Zack owned about 67 per cent of the stock of M. W. Zack Metal Company and was its president. His sons, Eugene M. and Samuel N. Zack, owned about 11 per cent and 9 per cent, respectively, of the corporation's stock and were vice president and treasurer, respectively. The remainder of the stock was owned by Zack's wife and grandchildren. Zack's son-in-law, Carl Schram, was assistant secretary and assistant treasurer of the corporation.

Zack's two sons and his son-in-law each received $8,000 from Tyroler on October 17, 1950, with the explanation that the amount "is your profit on the hoists deal." Zack was reimbursed for the advance made by him for the cost of the hoists so that he, his two sons, and his son-in-law equally shared the cost of the Zack interest in the hoists.

The petitioners reported for 1950 a long-term capital gain of $7,797.48 on the sale of the bomb hoists while their sons and son-in-law reported long-term capital gains of $4,000 each.

The Commissioner, in determining the deficiency, held that the transaction involving the bomb hoists was a joint venture between Breakstone, Tyroler, and Zack; the two sons and son-in-law were not members of the joint venture; and one-third of the earnings of the venture was taxable to Zack as ordinary income from the conduct of a trade or business.

The two sons and son-in-law of Zack each acquired a 20 per cent interest in a one-third interest in the 1,499 bomb hoists involved herein and continued to be the owners of such interests until the sale or abandonment of the hoists.

Zack and his associates held the bomb hoists for sale to customers in the ordinary course of their trade or business.

All facts stipulated are incorporated herein by this reference.

OPINION

Murdock, Judge: The Commissioner takes the position that the arrangement between Zack, his two sons, and his son-in-law, whereby they were to share in the one-third interest in the bomb hoists here involved on a 40-20-20-20 percentage basis, was a sham and, accordingly, he has taxed one-third of the profits from the sale of the hoists to the petitioners as ordinary income from a trade or business. Zack's sons and his son-in-law each acquired a 20 per cent interest in the bomb hoists in 1948 and continued to hold such interests until the sale or abandonment of the hoists. The agreement between Zack, his sons, and his son-in-law, as might be expected, lacked most of the formalization that such an agreement would have between parties who were not so closely related by family and business activity. But the evidence shows that they agreed to share the undertaking and they carried out that agreement, as the receipt of the cash distribution of their respective share verifies. The Commissioner erred by including the sons' and son-in-law's shares of the profit from the sales of the bomb hoists in the income of the petitioners.

The Commissioner's further position is that the income derived from the sale of the bomb hoists constituted ordinary income, instead of long-term capital gains as reported by the petitioners. His position is that transactions involving the bomb hoists resulted in the sales of other than capital assets within the provisions of section 117 (a)(1), Internal Revenue Code of 1939, because they

were property held by Zack and his associates primarily for sale to customers in the ordinary course of their trade or business.

The purchase and sale of the hoists was not a part of any other business regularly carried on by Zack, but it has long been recognized that a taxpayer may be engaged in several businesses. The question is whether Zack and his associates were selling the bomb hoists in the ordinary course of a business carried on by them. The only purpose in buying the bomb hoists was to resell them at a higher price. There was no "investment" such as might be made in other types of property, but on the contrary there was a general public offering and sales in such a manner that the exclusion of the statute cannot be denied.

Anything which Zack or his associates did in promoting the sales of the bomb hoists must also be attributed to each of the others. Breakstone displayed the hoists, printed and distributed a quantity of brochures illustrating and describing the hoists, wrote letters to and personally contacted potential customers, and continued this until practically all the hoists were sold. Likewise, Zack had his salesmen, who had been furnished with the brochures, looking for customers, and Tyroler was active in working with Breakstone and negotiating sales. The activities amounted to the carrying on of a business of selling the bomb hoists and the sales were to customers in the ordinary course of that business. The sales were not of capital assets. Cf. *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philber Equipment Corporation*, 25 T. C. 88.

Reviewed by the Court.

Decision will be entered under Rule 50.

Withey, J., dissenting: I must dissent from the majority opinion in this case for the reason that under the facts found there is not the continuity of sales necessary for the conduct of a business within the meaning of section 117 (a)(1) of the Internal Revenue Code of 1939. In support of its decision, the majority has cited *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philbet Equipment Corporation*, 25 T. C. 88. These cases as a matter of fact by corollary are authority for the opposite conclusion. In *Nathan D. Goldberg, supra*, ninety separate sales transactions of houses were consummated in 1946. In the area where the sales were made there was a heavy demand for houses; there was a ready market. In *Louis Greenspon, supra*, 138 sales transactions involving metal piping were carried on during the 2 years at issue. Sales were made to customers who were the ultimate users of such pipe and who comprised the customer list of a corporation with whom petitioner had been identified. In *Philbet Equipment Corporation, supra*, petitioner, through a used car dealer, during the fiscal year there involved sold 40 motor vehicles. The existence of customers constituting a ready market for used cars should be judicially noticed. In the case at bar, but four sales transactions took place between June 18, 1948, and September 11, 1950. There was no market for the bomb hoists involved. They were designed and useful only for the specialized purpose of hoisting bombs into the bomb bays of military aircraft. Petitioner individually made no sales of the hoists, secured no customers for them, employed no sales force, maintained no inventory of the hoists, nor any independent business office in connection with their sale. In fact, a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind. See *Thomas E. Wood*, 16 T. C. 213; *George R. Kroon*, 16 T. C. 1026; *Stern Brothers & Co.*, 16 T. C. 295.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 217

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Respondent has not attempted to meet the Petitioners' contention that there is a conflict in the Circuits as to whether the clearly erroneous rule prevents judicial review, as a question of law, of the trial court's determination of whether property is a capital asset. The Respondent has, indeed, cited several Courts of Appeals decisions,[1] including two of the Sixth Circuit, holding that

[1] The Respondent to the contrary (Respondent's Brief p. 5), we believe the Second Circuit's position is far from clear. In *Northup v.*

(Continued on next page)

the question is one of fact, subject to reversal only if the decision below is clearly erroneous. He has not denied, however, that other Courts of Appeal—the Third, Fifth and Seventh Circuits—have recently held that the question is one of "ultimate fact" subject to review free from the restraining impact of the clearly erroneous rule. (Citations on pages 10-11 of the Petition.)

In fact, the Respondent concedes the conflict exists, but in the same breath seeks to minimize the importance thereof in the following language:

> "To be sure, as taxpayer notes (Pet. 7), some of the courts have characterized the issue on review as one of 'ultimate fact', while others have labelled it simply as one of fact. But whatever the nomenclature used, they have uniformly recognized that the question is essentially factual in nature; none, so far as we are aware, has even suggested that the issue is simply one of law." (Respondent's Brief, pages 7 and 8.)

(Continued from preceding page)

United States, 2d Cir., 240 F. 2d 304, 307 (1957), the Court recently held that a similar question—i. e., whether a partial liquidation was "essentially equivalent" to a dividend involved "the application of a statutory rule to found facts" and was a "question of law"; and that "this is precisely the kind of question it is our function to decide". Nor has the Eighth Circuit fully defined its position. In both *Dillon v. Commissioner*, 8th Cir., 213 F. 2d 218 (1954)—cited by the Respondent—and *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947 (1956), the Eighth Circuit reversed the Tax Court, not because of any claimed error in the fact findings, but because it concluded that the Tax Court had made errors of law. The citation of *King v. Commissioner*, 5th Cir., 189 F. 2d 122 (1951) is misleading because of Respondent's failure to cite five later decisions of the Fifth Circuit holding that the question is one of ultimate fact "subject to review free of the restraining impact of the so-called 'clearly erroneous rule'": *Galena Oaks Corporation v. Scofield*, 5th Cir., 218 F. 2d 217, 219 (1954); and other cases cited on page 11 of our Petition.

The Respondent cites no authority for his sweeping observation. Admittedly the question is not simply one of law. However, neither is it simply one of fact. It is, of course, necessary to find the facts. After they are found, however, the application of the law thereto clearly presents a question of law. This is not a matter of mere "labelling", as Respondent contends. There is a vast difference between "fact" and "ultimate fact". This Court has held:

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481 (1937);

and

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law." *Baumgartner v. United States*, 322 U. S. 665 (1944).

It is respectfully submitted that in holding that the question whether property is a capital asset is one of fact which may not be reviewed as a question of law, free of the restraining impact of the clearly erroneous rule, the Courts of Appeal for the Sixth, Ninth and Tenth Circuits have failed to observe the vital distinction between "fact" and "ultimate fact" pointed out by this Court (in the above cited cases) and expressly observed by the Courts of Appeal for the Third, Fifth and Seventh Circuits in capital asset cases.

The announced difference in opinion as to the appellate function in this kind of case no doubt produces real differences in results. It is unlikely to have been mere coincidence that an examination of the reported cases for the last seven years discloses no reversal by the Sixth Circuit in a capital asset case. We have cited on pages

10-11 and 20-23 of our Petition six capital asset cases decided by the Third, Fifth or Seventh Circuits in the last two years that were reversals of the trial court. We do not mean to suggest that the Sixth Circuit may not on the merits have been justified in affirming every such case in the seven year period. We do submit, however, that there may well have been a connection between the restricted view it takes of the appellate function in this kind of case and its unbroken record of affirmances in that period.

The Respondent states that "* * * because of the factual nature of the question the Government has refrained from seeking certiorari in those [cases] decided adversely to it". (Respondent's Brief, page 6.) In support of that statement, the Respondent cites four recent Court of Appeals' decisions—two each from the Third and Fifth Circuits—decided against the Respondent. In each of these cases the Court of Appeals *reversed* the Tax Court.

The Respondent thus takes the extreme, and, we submit, untenable position, that the propriety of a reversal by a Court of Appeals of the Tax Court presents a question of fact. While the Respondent might possibly refrain from appealing to a Court of Appeals a decision of the Tax Court adverse to him because of his belief that the question is always one of fact, that should not restrain him in a proper case from seeking certiorari as to decisions of the Courts of Appeals reversing the Tax Court on the ground that the question is not one of fact, but one of law.

Moreover, three of the four decisions so cited by the Respondent, *Philber Equipment Corp. v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956), *Goldberg v. Commissioner*, 5th Cir., 223 F. 2d 709 (1955), and *Curtis Co. v. Commissioner*, 3rd Cir., 232 F. 2d 167 (1956), (discussed on pages 10 and 11 of the Petition) hold that the question pre-

sented is one of law rather than of fact. One would think that such holdings, contrasted with the Respondent's success in convincing the Sixth, Ninth and Tenth Circuits that the question is one of fact, might induce him to seek certiorari to resolve the conflict on this important and recurring question.

The Respondent has stated, however, that he will not seek certiorari in capital asset cases, whether the Court of Appeals affirms the trier of facts against the Government, or the Court of Appeals reverses the trier of facts against the Government. It follows therefrom, that if the clear conflict between the Courts of Appeals on the scope of their power is to be resolved, it will, it is respectfuly submitted, be in a case where this Court grants a taxpayer's petition.

The Respondent makes the following statement:

> "Moreover, in view of the wide variations in 'factual' content of so-called 'capital-gain and loss cases' (Pet. 8), some 'diversity' of views regarding the scope of review in such cases would appear not only inevitable but also appropriate; no single formula can be applied across the board to so broad a category of tax litigation." (Respondent's Brief, page 8.)

We do not agree. It is neither inevitable nor appropriate that there be diversity in views regarding the scope of review. It is not appropriate for the Courts of Appeals of three circuits to hold that the question is one which cannot be reviewed free of the restraining impact of the clearly erroneous rule, and for the Courts of Appeals of three other circuits to hold exactly the opposite. On this question there is only one appropriate view, and we respectfully submit that this Court should grant the Petition to resolve the question and to decide which view is the correct one.

During the year 1956 the Courts of Appeals handed down approximately 18 reported decisions involving the question of whether or not a lower court had committed error in a case involving the capital asset definition. It is, therefore, apparent that the question of what is a capital asset is constantly before the Courts of Appeals.

In view of the clear conflict of opinion as to the appellate function in this recurring and important category of cases between the Courts of Appeals of the Sixth, Ninth and Tenth Circuits, on the one hand, and of the Third, Fifth and Seventh Circuits, on the other hand, it is respectfuly submitted that the Petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

MORRIS W. ZACK AND SARAH ZACK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 7a-15a) are reported at 25 T.C. 676. The order of the Court of Appeals (Pet. 5a), affirming the Tax Court's decision, has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 5a) was entered on March 19, 1957. The order denying taxpayer's[1] petition for rehearing (Pet. 6a) was entered on March 26, 1957. The petition for a writ of certiorari was filed on June 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

[1] References to the "taxpayer" are to the petitioner Morris W. Zack. His wife is a party only because a joint return was filed.

QUESTION PRESENTED

Whether the record warrants the Tax Court's conclusion, affirmed by the court below, that property sold by a joint venture of which taxpayer was a member was held primarily for sale to customers in the ordinary course of business, and that consequently the sales profits were taxable as ordinary income rather than as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does

not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *.

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts, as stipulated, developed at the trial, and set forth in the Tax Court's findings of fact (Pet. 7a-13a), are as follows:

On March 20, 1948, Samuel Breakstone of Cleveland, Ohio, entered into a contract with the H. J. Johnson Company whereby the company agreed to sell Breakstone 1,565 electric bomb hoists at $15 each. The bomb hoists were devices utilized in military aircraft to lift the bombs into place. The items had been declared surplus by the Armed Forces after the conclusion of World War II. (Pet. 7a.) Breakstone, due to financial difficulties, offered to sell an interest in the bomb hoists to J. H. Tyroler of Cleveland, Ohio, who in turn contacted taxpayer, offering him an additional interest in the bomb hoists. (Pet. 8a-9a.) On April 13, 1948, Breakstone, Tyroler, and the taxpayer entered into a contract entitled "Agreement and Joint Venture" wherein it was agreed that the three parties were to share equally in the profits and losses on the bomb hoists. (Pet. 9a-10a.) Taxpayer gave $15,000 to be applied on the purchase price of the hoists. (Pet. 10a.)

The actual number of bomb hoists received from the Johnson Company was 1,499. Four hoists were sold to Gimbel Brothers at $65 each on June 18, 1948. In 1950 four hoists were sold to the Taylor Machine Company, Cleveland, Ohio, for a total of $234. In September, 1950, McGrath and Company purchased 200 bomb hoists for a price of $100 each, and the Parkersburg Junk Company purchased 1,275 bomb hoists at a price of $100 each. The remaining 16 unsold bomb hoists were eventually abandoned. (Pet. 11a.)

Prior to and subsequent to the joining of Tyroler and taxpayer as associates of Breakstone, the latter had displayed bomb hoists in his store, printed and distributed brochures illustrating and describing the hoists, and contacted prospective customers through letters and calls in person. He engaged in these various sales activities until practically all of the bomb hoists had been sold. (Pet. 10a.)

Breakstone purchased the hoists, and taxpayer and Tyroler acquired interests in the hoists, with a view to their immediate resale. Taxpayer never personally solicited customers for the hoists, but he informed salesmen employed by the M. W. Zack Metal Company, of which he was president and controlling stockholder, about the hoists and requested them to notify him when they came in contact with prospective customers for the hoists. The salesmen were furnished with sales literature by Breakstone. (Pet. 10a-11a.)

Breakstone procured Gimbel Brothers, Taylor Machine Company, and Parkersburg Junk Company as purchasers of the hoists and furnished Tyroler with the name of McGrath and Company as a prospective purchaser. (Pet. 11a.)

The Tax Court, one judge dissenting, concluded that taxpayer and his associates held the bomb hoists for sale to customers in the ordinary course of a trade or business, and that therefore the sales profits constituted ordinary income rather than capital gain from sales of capital assets. (Pet. 14a.) The Court of Appeals affirmed, one judge dissenting. (Pet. 5a.)

ARGUMENT

The question presented is one of fact, and the court below correctly affirmed the Tax Court's decision. There is no conflict of decisions, nor any other reason for further review.

1. This case presents the oft-litigated issue of whether sales profits are taxable as ordinary income or as capital gain. Section 117(a) of the Internal Revenue Code of 1939, *supra*, pp. 2-3, excludes from the definition of capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". Whether particular property falls within the excepted category presents a question of fact in each case, no single evidentiary factor being decisive, and the trial court's conclusion is entitled to affirmance unless clearly erroneous. Among relevant factors to be considered are the intention of the taxpayer in acquiring the property, frequency and continuity of sales, advertising and other promotion of the property for sale, and any other circumstances bearing upon whether the selling activities amounted to the carrying on of a business.[2] This

[2] Cases in the Courts of Appeals involving the question presented are legion, and they hold that the question is one of fact. See, e.g., *S.E.C. Corp.* v. *United States*, 241 F. 2d 416 (C.A. 2d), certiorari denied June 10, 1957, No. 937, October Term, 1956; *Harry*

Court has denied petitions for certiorari in similar cases decided adversely to the taxpayers,[3] and because of the factual nature of the question the Government has refrained from seeking certiorari in those decided adversely to it.[4] There is no more reason for further review of this case than of the others involving the same question.

2. The record fully supports the Tax Court's conclusion that the property here involved—bomb hoists acquired by a joint venture comprised of taxpayer and two others—was held by taxpayer and his associates primarily for sale to customers in the ordinary course of business. The record shows, as the Tax Court pointed out (Pet. 10a-11a, 13a-14a), that the property was purchased for immediate resale at a profit, and not for investment; that brochures were printed and distributed advertising the property for sale; that potential customers were also personally and actively solicited; that the property was displayed in the store of one of the associates (Breakstone); that sales literature was furnished to taxpayer's salesmen; and that

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Slatkin Builders v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C.A. 10th); *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5th), certiorari denied, 342 U.S. 829; *Harriss* v. *Commissioner*, 143 F. 2d 279 (C.A. 2d); *Winnick* v. *Commissioner*, 223 F. 2d 266 (C.A. 6th); *Dillon* v. *Commissioner*, 213 F. 2d 218 (C.A. 8th).

[3] See, e.g., *S.E.C. Corp.* v. *United States*, *supra*; *Harry Slatkin Builders* v. *Commissioner*, *supra*; *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, *supra*.

[4] See, e.g., *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C.A. 3d); *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th); *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5th); *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (C.A. 3d).

these activities continued until all the hoists were sold.[5] In the light of these undisputed facts, the Tax Court was plainly justified in concluding (Pet. 14a) that the activities of taxpayer and his associates "amounted to the carrying on of a business of selling the bomb hoists", and, under familiar rules governing the scope of judicial review of the trial court's factual determinations, the Court of Appeals was equally justified in affirming. *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395. Both courts below having decided the factual issue against taxpayer, their concurrent finding is entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51, and *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

3. There is no conflict. Since the question is factual, each case in this field turns, as it must, on its own record. That an appellate court may have been warranted in reversing a trial court's decision in some other case involving a similar question scarcely furnishes a basis for assuming, as does taxpayer, that the court below was obliged to reverse in this case.

Taxpayer asserts conflict on the theory (Pet. 7-8, 19-21) that the courts of appeals have evinced a "diversity" of views regarding the scope of appellate review in cases involving "the question of whether [certain] property is a capital asset." To be sure, as taxpayer

[5] Taxpayer's contention (Pet. 16-19) that the sales activities of his associates (Breakstone and Tyroler) are not attributable to him rests upon the unwarranted assumption, contrary to the record, to the findings, and indeed to the express agreement of the parties (Pet. 18, 9a-10a)—that their arrangement was that of a joint venture. A joint venture is a partnership for tax no less than for other purposes. (Section 3797(a)(2) of the Internal Revenue Code of 1939), and the acts of one member are of course binding upon the others.

notes (Pet. 7), some of the courts have characterized the issue on review as one of "ultimate fact", while others have labelled it simply as one of fact. But whatever the nomenclature used, they have uniformly recognized that the question is essentially factual in nature; none, so far as we are aware, has even suggested that the issue is simply one of law. Moreover, in view of the wide variations in "factual" content of so-called "capital gain and loss cases" (Pet. 8), some "diversity" of views regarding the scope of review in such cases would appear not only inevitable but also appropriate; no single formula can be applied across the board to so broad a category of tax litigation. At any rate, on the record here presented, it cannot be said that the court below erred in sustaining the Tax Court's decision, even assuming that the issue were characterized as one of "ultimate fact."

4. Contrary to taxpayer's contention (Pet. 13-16), the fact that one judge of the Tax Court (the lone dissenting judge) heard the case and another judge wrote the opinion for the full court does not require reversal of the Tax Court's decision. *Halle* v. *Commissioner*, 175 F. 2d 500 (C.A. 2d), certiorari denied, 338 U.S. 949; *Latchis Theatres of Keene* v. *Commissioner*, 214 F. 2d 834 (C.A. 1st); *Showell* v. *Commissioner*, 238 F. 2d 148 (C.A. 9th). This rule applies even where the findings are based upon conflicting testimony (*Latchis Theatres of Keene* v. *Commissioner*, *supra*, p. 837), and it applies *a fortiori* where as here the evidentiary facts underlying the Tax Court's decision are not in dispute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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